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No. 10705

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

✓
2374

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DIESEL SCREW "BETSY ROSS", PETER CEKA-
LOVICH, DOMINIC MRATINICH and FRANK
MULJAT,

Appellants,

vs.

STEVE RULJANOVICH,

Appellee.

—
APOSTLES ON APPEAL

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

—

FILED

JUN 21 1944

PAUL P. O'BRIEN,
CLERK

No. 10705

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DIESEL SCREW "BETSY ROSS", PETER CEKALOVICH, DOMINIC MRATINICH and FRANK MULJAT,

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INDEX

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italics* the two words between which the omission seems to occur.]

Page

Amended Libel in Rem and in Personam, Second.....	3
Amended Libel in Rem and in Personam, Third.....	19
Answer to Third Amended Libel in Rem and in Personam	26
Appeal:	
Assignment of Error.....	48
Bond on	46
Citation on.....	2
Notice of	42
Notice of Filing Bond on.....	42
Order Allowing.....	41
Order Extending Time to File Apostles on, Stipulation and	59
Petition for	40
Points Upon Which Appellee Intends to Rely on.....	55
Praecipe	52
Assignments of Error.....	48
Bond on Appeal.....	46
Certificate of Clerk.....	60
Citation on Appeal.....	2
Claim	10
Decree, Final.....	38

ii.

	Page
Exceptions to Second Amended Libel.....	14
Final Decree.....	38
Findings of Fact and Conclusions of Law.....	32
Libel in Rem and in Personam, Second Amended.....	3
Libel in Rem and in Personam, Third Amended.....	19
Minute Order Entered December 20, 1943.....	31
Minute Order Entered June 14, 1943.....	18
Names and Addresses of Proctors.....	1
Notice of Appeal.....	42
Notice of Filing Bond on Appeal.....	42
Order Allowing Appeal.....	41
Order for Release of Vessel.....	12
Petition for Appeal.....	40
Points Upon Which Appellee Intends to Rely Upon Appeal	55
Praecept	52
Second Amended Libel in Rem and in Personam.....	3
Stipulation and Order Extending Time to File Apostles on Appeal	59
Statement of Points on Which Appellants Intend to Rely on Appeal and Designation of Parts of Record Necessary for the Consideration Thereto.....	287
Stipulation and Order re Exhibits and Reporter's Transcript	58
Stipulation for Release of Vessel.....	12
Third Amended Libel in Rem and in Personam.....	19

Witnesses for Libelant:	Page
Cekalovich, Dinka	
—direct	180
—cross	182
Cekalovich, Peter	
—direct	155
—direct (recalled)	185
Dickerson, Donell G.	
—direct	110
—cross	117
—redirect	123
Gibson, Neal D.	
—direct	136
—cross	141
—redirect	150
Gordon, Eddie Monroe	
—direct	81
Roberts, Murray H.	
—direct	100
Ruljanovich, Milica	
—direct	162
—cross	163
Ruljanovich, Steve	
—direct	66
—direct (recalled)	92
—cross (recalled)	103
—direct (recalled)	183
—direct (rebuttal)	239
—cross (rebuttal)	241
Walsworth, Clark B.	
—direct	126
—cross	131
Zitko, George	
—direct	152

	Page
Exceptions to Second Amended Libel.....	14
Final Decree.....	38
Findings of Fact and Conclusions of Law.....	32
Libel in Rem and in Personam, Second Amended.....	3
Libel in Rem and in Personam, Third Amended.....	19
Minute Order Entered December 20, 1943.....	31
Minute Order Entered June 14, 1943.....	18
Names and Addresses of Proctors.....	1
Notice of Appeal.....	42
Notice of Filing Bond on Appeal.....	42
Order Allowing Appeal.....	41
Order for Release of Vessel.....	12
Petition for Appeal.....	40
Points Upon Which Appellee Intends to Rely Upon Appeal	55
Praecipe	52
Second Amended Libel in Rem and in Personam.....	3
Stipulation and Order Extending Time to File Apostles on Appeal	59
Statement of Points on Which Appellants Intend to Rely on Appeal and Designation of Parts of Record Necessary for the Consideration Thereto.....	287
Stipulation and Order re Exhibits and Reporter's Transcript	58
Stipulation for Release of Vessel.....	12
Third Amended Libel in Rem and in Personam.....	19

Witnesses for Libelant:	Page
Cekalovich, Dinka	
—direct	180
—cross	182
Cekalovich, Peter	
—direct	155
—direct (recalled)	185
Dickerson, Donell G.	
—direct	110
—cross	117
—redirect	123
Gibson, Neal D.	
—direct	136
—cross	141
—redirect	150
Gordon, Eddie Monroe	
—direct	81
Roberts, Murray H.	
—direct	100
Ruljanovich, Milica	
—direct	162
—cross	163
Ruljanovich, Steve	
—direct	66
—direct (recalled)	92
—cross (recalled)	103
—direct (recalled)	183
—direct (rebuttal)	239
—cross (rebuttal)	241
Walsworth, Clark B.	
—direct	126
—cross	131
Zitko, George	
—direct	152

Witnesses for Respondents:	Page
Bishop, Carl R.	
—direct	164
—cross	170
—redirect	179
Christian, Winter W.	
—direct	187
—cross	190
Karuza, Nick	
—direct	191
—cross	194
Muljat, Frank N.	
—direct	196
—cross	199
—redirect	201
Ruljanovich, Steve—deposition	
—direct	202
Rebuttal Witnesses:	
Ruljanovich, Steve	
—direct	239
—cross	241

INDEX TO EXHIBITS

Libelant's Exhibits:

No. 1. Five Receipts From Dr. Dunbar to Steve Ruljanovich	93
No. 2. Four Receipts From Dr. Cassidy to Steve Ruljanovich	95
No. 3. Four Receipts From Dr. Walsworth to Steve Ruljanovich	98

Respondents' Exhibits:

A. Copy of Application for Adjustment Claim No. 62423	63
E. Record of Proceedings Before the Industrial Accident Commission	242

NAMES AND ADDRESSES OF PROCTORS:

For Appellants:

HENRY E. KAPPLER

639 S. Spring St.,
Los Angeles 14, Calif.

For Appellee:

DAVID A. FALL

388 S. 7th St.,
San Pedro, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States of America, ss.

To Steve Ruljanovich, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 3rd day of March, A. D. 1944, pursuant to an order allowing appeal filed on Jan. 21, 1944, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 2693, O'C, Central Division, wherein Diesel Screw "Betsy Ross," Peter Cekalovich, Dominic Mratinich and Frank Muljat are appellants and you are appellee to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. F. T. O'Connor, United States District Judge for the Southern District of California, this 21st day of January, A. D. 1944, and of the Independence of the United States, the one hundred and sixty seventh.

J. F. T. O'CONNOR,

U. S. District Judge for the Southern District
of California.

Service of a copy of the foregoing Citation is acknowledged this 25th day of January, 1944, and copies of Notice of Appeal, Petition for Appeal, Order allowing Appeal and Assignments of Error.

DAVID A. FALL,

Proctor for Appellee.

[Endorsed]: Filed Jan. 25, 1944. [2]

In the United States District Court, Southern District
of California, Central Division

No. 2693 O'C
IN ADMIRALTY

STEVE RULJANOVICH,

Libelant,

vs.

DIESEL SCREW "BETSY ROSS," her *tackel*, apparel, engines, and furniture; and PETER CEKALOVICH, MASTER of said vessel, and PETER CEKALOVICH, DOMINIC MRATINICH AND FRANK MULJAT, her owners,

Respondents.

SECOND AMENDED LIBEL IN REM AND
IN PERSONAM.

To the Honorable Judges of the District Court of the
United States, Southern District of California,
Central Division,

IN ADMIRALTY.

The Second Amended Libel of Steve Ruljanovich, late a fisherman seaman on board the Diesel Screw "Betsy Ross," whereof Peter Cekalovich now is and has been at all times herein mentioned, Master, against the said ship, her *tackel*, apparel, engines, furniture, etc., and Peter Cekalovich, Master of said vessel, and Peter Cekalovich, Dominic Mratinich and Frank Muljat, her owners, in a cause of contract, damage, wages, maintenance and cure, civil and maritime, alleges as follows:

FIRST: That on or about the 3rd day of May, 1942, the said Diesel Screw "Betsy Ross", then lying in the Port of Los Angeles, destined for an eleven

(11) months' Tuna and Sardine Fishing seasons, the then Master, Peter Cekalovich, by himself, hired this libelant as a fisherman seaman for the said seasons on the one-seventeenth lay or share of what should be taken, as wages, [3] and this libelant then accepted and entered into his duties as a member of the crew of the said "Betsy Ross."

SECOND: That on or about the 3rd day of May, 1942, this libelant entered into the duties as a member of the crew of the said ship.

THIRD: That on the 4th day of May, 1942, while this libelant was engaged in the service of said ship, and while doing his duty and obeying the commands of the Master of the "Betsy Ross", libelant was struck on the head by a heavy timber while at a warehouse, located at Terminal Island, at the Port of Los Angeles, for the purpose of bringing the ship's net from the said warehouse to the "Betsy Ross"; that by reason of being struck upon the head, as aforesaid, libelant sustained severe cerebral concussion, scalp laceration, contusions about his head and a possible skull fracture. That in addition thereto, libelant sustained damage to a denture in his mouth.

FOURTH: That as the result of said injuries, as aforesaid, libelant was confined to a hospital for a period of one week; and ever since the 4th day of May, 1942, libelant has been totally disabled as the result thereof, and is informed and believes, and therefore alleges that he will be disabled for a long and indeterminate period of time.

FIFTH: That as a result of the injuries as aforesaid, libelant has been under the care of duly licensed

physicians and surgeons, and that libelant is informed and believes, and therefore alleges that he will necessarily be under the care of duly licensed physicians and surgeons for an indeterminate period of time as the result of the aforesaid injuries. That libelant is uninformed as to the reasonable value of the medical services rendered to him to the present time, for which he has incurred liability in the treatment of the aforesaid injuries, and for which will be necessary in the future.

[4]

SIXTH: That by reason of the injuries as aforesaid, libelant claims to be entitled to demand and have the said ship pay his reasonable expenses already incurred and hereafter to be incurred in and about his cure, and his reasonable support since his said injury and until he has reached the maximum degree of recovery, or until he is able to return to his work, which said support is of the reasonable value of \$3.00 per day. That the reasonable amount accrued for such support to this date is One Thousand Ninety-Eight (\$1,098.00) Dollars.

SEVENTH: That the said Diesel Screw "Betsy Ross" is an American vessel and now is and will be during the currency of process herein, within the District of Southern California, and within the jurisdiction of this Honorable Court.

EIGHTH: That libelant is a seaman, within the designation of persons permitted to sue herein without furnishing Bond for or prepayment of or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 837, U. S. C. A.

NINTH: That all and singular the premises are true, and within the Admiralty and maritime jurisdiction of this Honorable Court. In verification whereof, if denied, the libelant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

FOR A SECOND, SEPARATE AND DISTINCT
CAUSE OF ACTION AND LIBEL IN REM
AND IN PERSONAM, LIBELANT ALLEGES
AS FOLLOWS:

FIRST: Libelant refers to, incorporates herein and makes a part hereof, as if fully set forth herein, paragraphs First, Second, Third, Fourth, Seventh, Eighth and Ninth of the First Cause of Action in this Second Amended Libel.

SECOND: That while this libelant has been confined and unable to work, as the result of the injuries as aforesaid, the said "Betsy Ross" engaged in fishing during the proposed Tuna and [5] Sardine seasons for which libelant was employed, and during the said seasons, the vessel took and caught a great quantity of Tuna and Sardines, which libelant is informed and believes and alleges, that his one-seventeenth lay or share of said catch being worth the sum of Six Thousand (\$6,000.00) Dollars and upwards, which the Master and owners of the said vessel have hitherto refused and still refuse to pay, to the great damage of the libelant. That the full amount of said lay or share was due and payable not later than the 15th day of March, 1943; and libelant is entitled to interest thereon at 7% per annum from its due date until paid.

FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION AND LIBEL IN PERSONAM, LIBELANT ALLEGES AS FOLLOWS:

FIRST: Libelant refers to, incorporates herein and makes a part hereof, as if fully set forth herein, paragraphs First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth of the First cause of action in this Second Amended Libel.

SECOND: That at all times herein mentioned Peter Cekalovich, Dominic Mratinich and Frank Muljat were and are the owners of the Diesel Screw "Betsy Ross".

THIRD: That the said accident, as set forth in paragraph Third of libelant's first cause of action, and made a part hereof by reference, was *cause*, without any contributing fault or neglect on the part of libelant, and as a proximate result of the combined negligence of the Crescent Warehouse Company, and the negligence of Frank Muljat, part owner and member of the crew of the Diesel Screw "Betsy Ross", and the negligence of the said vessel in the following, among other particulars, which will be pointed out on the trial of this action:

(1) By Frank Muljat negligently and carelessly pushing over a large timber approximately 16½ feet in length, which, without any warning to libelant, struck libelant upon the head; [6]

(2) By the negligent failure of Frank Muljat, part owner and member of the crew of the Diesel Screw "Betsy Ross", to give libelant warning of the falling timber;

(3) By the negligent pushing against or leaning against a timber, which was standing on end and leaning against the side of the aforesaid warehouse, by respondent Frank Muljat, causing said timber to fall upon the head of libelant herein.

(4) In that the vessel, its master and owners failed to provide libelant with a safe place to work.

FOURTH: That by reason of the premises herein and the accident as aforesaid, libelant sustained severe bodily injuries to his head and entire nervous system; that as a result thereof he has been totally disabled and incapacitated from work since the date of his injuries; and libelant is informed and believes and therefore alleges that he will be unable to return to his work as a seaman or any other employment for an indeterminate period of time.

FIFTH: That libelant is informed and believes, and therefore alleges that the injuries so sustained are permanent in their character.

SIXTH: That libelant is married and lives with and supports his wife; and up until the accident set forth herein, libelant earned approximately \$40.00 per week in cannery work.

SEVENTH: That by reason of the premises herein, libelant has been generally damaged in the sum of \$15,000.00.

WHEREFORE: Libelant prays that process in due form of law according to the course of this Honorable Court in cases of Admiralty and maritime jurisdiction, may issue against the said Diesel Screw "Betsy Ross",

her *tackel*, apparel, furniture; and that Peter Cekalovich, master of said vessel, and all persons having any right, title or interest in said vessel, her *tackel*, apparel or furniture, may be cited to appear and answer all [7] matters aforesaid, and that this Honorable Court may be pleased to decree the payment of wages, maintenance and cure, and damages aforesaid, with costs, and that the said vessel may be condemned and sold to pay the same, and that libelant may have such other relief in the premises, as in law and justice he may be entitled to receive.

DAVID A. FALL,
David A. Fall
Proctor of Libelant,

388 W. 7th Street, San Pedro, California,
Phone Harbor 2811.

[Verified.]

[Endorsed]: Filed May 7, 1943. [8]

In the United States District Court, Southern District
of California, Central Division

IN ADMIRALTY

No. O'C 2693

STEVE RULJANOVICH,

Libellant,

vs.

DIESEL SCREW "BETSY ROSS", etc., et al.,

Respondents,

PETER CEKALOVICH, DOMINIC MRATINICH
and FRANK MULJAT,

Claimants.

CLAIM

To the Honorable Judges of the District Court of
the United States for the Southern District of Cali-
fornia:

The claim of Peter Cekalovich, Dominic Mratinich
and Frank Muljat to the Diesel Screw "Betsy Ross",
her tackle, apparel, engines and furniture, now in the
custody of the United States Marshal for the South-
ern District of California, at the suit of the libellant
above named, alleges:

That said Peter Cekalovich, Dominic Mratinich and
Frank Muljat are the true and bona fide owners of the
said Diesel Screw "Betsy Ross", her tackle, apparel,
engines and furniture and that no other persons are the
owners thereof and the said Peter Cekalovich, Dominic
Mratinich and Frank Muljat claim the same.

Wherefore, these claimants pray that this Honorable Court [9] will be pleased to decree a restitution of the said Diesel Screw "Betsy Ross", her tackle, apparel, engines and furniture to these claimants and otherwise right and justice to administer in the premises.

PETER CEKALOVICH

Peter Cekalovich

DOMINIC MRATINICH

Dominic Mratinich

FRANK MULJAT

Frank Muljat

HENRY E. KAPPLER

Henry E. Kappler

Proctor for Claimants.

[Verified.]

[Endorsed]: Filed Mar 25, 1943. [10]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the libellant and the Claimants above named, by and through their respective proctors, that the Diesel Screw "Betsy Ross", her tackle, apparel, engines and furniture may be released forthwith from the custody of the United States Marshal for the Southern District of California upon said Claimants giving an admiralty stipulation and bond in the sum of \$11,000.00, in the usual form, with an accredited surety company as surety thereon.

Dated: Los Angeles, California, this 25th day of March, 1943.

DAVID A. FALL

Proctor for Libellant

HENRY E. KAPPLER

Proctor for Claimants.

[Endorsed]: Filed Mar 25, 1943. [11]

[Title of District Court and Cause.]

ORDER

Whereas, a libel and amended libel have been filed by the above named libellant against the Diesel Screw "Betsy Ross", her tackle, apparel, engines and furniture, et al., for the reasons and causes in said libel and amended libel mentioned; and

Whereas, a bond stipulating payment of costs in the sum of \$250.00 has been executed by the Fireman's Fund Indemnity Company, a corporation, as surety; and

Whereas, said bond has been filed with the above entitled court; and

Whereas, a bond in the sum of \$11,000.00, has been executed by the Fireman's Fund Indemnity Company, a corporation, as surety, and Peter Cekalovich, Dominic Mratinich and Frank Muljat as principals; and [12]

Whereas, said bond has been filed with the above entitled court, and the said bond being conditioned that in the event of failure of the principals Peter Cekalovich, Dominic Mratinich and Frank Muljat to abide by all orders of this Court made or to be made herein, then said surety will pay the amount ordered by the final decree, not exceeding the penal sum of \$11,000.00; and

Whereas, said bonds have been and each of them is hereby approved by the court;

It Is Hereby Ordered that the Diesel Screw "Betsy Ross" her tackle, apparel, engines and furniture, be forthwith released to the claimants Peter Cekalovich, Dominic Mratinich and Frank Muljat.

Done in open court this 25 day of March, 1943.

J. F. T. O'CONNOR
United States District Judge.

[Endorsed]: Filed Mar 25, 1943. [13]

In the United States District Court, Southern District
of California, Central Division

IN ADMIRALTY

No. O'C 2693

STEVE RULJANOVICH,

Libellant,

vs.

DIESEL SCREW "BETSY ROSS", her tackel, ap-
parel, engines and furniture, et al.,

Respondents.

EXCEPTIONS TO SECOND AMENDED LIBEL

Come now the respondents Peter Cekalovich, Dominic
Mratinich and Frank Muljat and except to the second
amended libel, as follows:

I.

The above entitled Court has no jurisdiction as to the
first cause of action set forth in said second amended
libel.

II.

The above entitled Court has no jurisdiction as to
the second cause of action set forth in said second
amended libel.

III.

The above entitled Court has no jurisdiction as to the
third cause of action in that it appears that the injuries,
if any, sustained by the libellant occurred in a ware-
house, not alleged to have been owned or operated by
the respondents or any them, and [14] which said
warehouse was and is located on Terminal Island at the
Port of Los Angeles, and was not in anywise connected
with the fishing vessel "Betsy Ross".

IV.

Respondents except to the distinctness, fullness and sufficiency of the Third Article of the third cause of action upon the ground that it cannot be ascertained therefrom how or in what respect the respondent Frank Muljat was negligent or careless in pushing over a large timber.

V.

Respondents except to the distinctness, fullness and sufficiency of said Third Article in said third cause of action upon the ground that it cannot be ascertained therefrom whether the respondent Frank Muljat is alleged to have pushed against said timber or whether he is alleged to have leaned against said timber.

VI.

Respondents except to the distinctness, fullness and sufficiency of said Third Article in said third cause of action upon the ground that it cannot be ascertained therefrom how or in what respect the respondents failed to provide the libellant with a safe place in which to work and said uncertainty arises by reason of the fact that there is no allegation that the injuries occurred aboard the fishing vessel "Betsy Ross".

Wherefore, respondents pray that the exceptions, or such thereof as the Court decides are properly taken, be sustained and that the libellant be compelled to amend his libel, or in lieu thereof and in the event of a refusal or failure to amend, that the said second amended libel be dismissed.

HENRY E. KAPPLER

Henry E. Kappler

Proctor for Respondents.

639 South Spring St.,

Los Angeles, California. [15]

MEMORANDUM OF POINTS AND
AUTHORITIES

I.

The rules of pleading in admiralty causes provide that the cause of action should be plainly and explicitly set forth.

Benedict, 6th Edition, Second Volume, pg. 67.

All that is set forth in connection with the articles contained in the third cause of action is that the respondent Muljat negligently pushed or leaned against a timber. Respondents are entitled to a more detailed and complete statement with reference to the alleged conduct of the respondent Muljat. Particularly is this true where it is alleged as a separate ground of complaint that the respondents failed to provide the libellant with a safe place in which to work.

II.

The above entitled Court has no jurisdiction of the causes of action set forth in the second amended libel.

See

Alaska Packers Asso. v. Industrial Accident
Commission, 72 L. Ed. 400.

It appears from the face of the second amended libel that the libellant was injured while in a warehouse located upon Terminal Island. He was injured while doing something which could have been done by a person other than a seaman or fisherman and under the

aforementioned authority his sole remedy would be by a proceeding before the Industrial Accident Commission of the State of California.

In the case of *Alaska Packers Asso. v. I. A. C.*, supra, it was held that a fisherman-seaman who was injured on land was entitled to the benefits of the compensation laws of the State of California. The Labor Code provides that where liability for the payment of compensation exists, the remedy provided by the Labor Code shall be the exclusive remedy against the employer. [16]

The second amended libel sets forth that the respondents were at all times the employers of the libellant.

It is respectfully submitted that the second amended libel should be dismissed.

HENRY E. KAPPLER,
Henry E. Kappler
Proctor for Respondents.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun 4, 1943. [17]

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 14th day of June in the year of our Lord one thousand nine hundred and forty-three.

Present:

The Honorable J. F. T. O'Connor, District Judge.

Steve Ruljanovich,

Libelant,

vs.

No. 2693-O'C Adm.

Diesel Screw "Betsy Ross", etc.,

Respondent

This cause coming on for hearing on exceptions of respondents to the second amended libel, pursuant to notice filed June 4, 1943; Henry E. Kappler, Esq., appearing as counsel for the respondents: Attorney Kappler makes a statement; the Court makes a statement, and holds it has jurisdiction and that respondent is entitled to a more definite statement as to what the alleged negligence consists of, and orders this cause continued for the Term for setting for trial.

[Title of District Court and Cause.]

THIRD AMENDED LIBEL IN REM AND IN
PERSONAM

To the Honorable Judges of the District Court of the
United States, Southern District of California,
Central Division,

IN ADMIRALTY.

The Third Amended Libel of Steve Ruljanovich, late a fisherman on board the Diesel Screw "Betsy Ross", whereof Peter Cekalovich, now is and has been at all times herein mentioned, Master, against the said ship, her *tackel*, apparel, engines, furniture, etc., and Peter Cekalovich, Master of said vessel, and Peter Cekalovich, Dominic Mratinich and Frank Muljat, her owners, in a cause of contract, damage, wages, maintenance and cure, civil and maritime, alleges as follows:

FIRST: That on or about the 3rd day of May, 1942, the [19] said Diesel Screw "Betsy Ross", then lying in the Port of Los Angeles, destined for an Eleven (11) months' Tuna and Sardine Fishing seasons, the then Master, Peter Cekalovich, by himself, hired this libellant as a fisherman seaman for the said seasons on the One-seventeenth lay or share of what should be taken, as wages, and this libellant then accepted and entered into his duties as a member of the crew of the said "Betsy Ross".

SECOND: That on or about the 3rd day of May, 1942, this libellant entered into the duties as a member of the crew of the said ship.

THIRD: That on the 4th day of May, 1942, while this libellant was engaged in the service of said ship,

and while doing his duty and obeying the commands of the Master of the "Betsy Ross", libellant was struck on the head by a heavy timber, while at a warehouse located at Terminal Island, at the Port of Los Angeles, for the purpose of bringing the ship's net from the said warehouse to the "Betsy Ross"; that by reason of being struck upon the head, as aforesaid, libellant sustained severe cerebral concussion, scalp laceration, contusions about his head and a possible skull fracture. That in addition thereto, libellant sustained damage to a denture in his mouth.

FOURTH: That as the result of said injuries, as aforesaid, libellant was confined to a hospital for a period of one week, and ever since the 4th day of May, 1942, libellant has been totally disabled as the result thereof, and is informed and believes, and therefore alleges that he will be disabled for a long and indeterminate period of time.

FIFTH: That as a result of the injuries as aforesaid, libellant has been under the care of duly licensed physicians and surgeons, and that libellant is informed and believes, and therefore alleges that he will necessarily be under the care of duly licensed physicians and surgeons for an indeterminate period of [20] time as the result of the aforesaid injuries. That libellant is uninformed as to the reasonable value of the medical services rendered to him to the present time, for which he has incurred liability in the treatment of the aforesaid injuries, and for which will be necessary in the future.

SIXTH: That by reason of the injuries as aforesaid libellant claims to be entitled to demand and have

the said ship pay his reasonable expenses already incurred and hereafter to be incurred in and about his cure, and his reasonable support since his said injury and until he has reached the maximum degree of recovery, or until he is able to return to his work, which said support is of the reasonable value of \$3.00 per day. That the reasonable amount accrued for such support to this date is One Thousand Ninety-Eight (\$1,098.00) Dollars.

SEVENTH: That the said Diesel Screw "Betsy Ross" is an American vessel and now is and will be during the currency of process herein, within the District of Southern California, and within the jurisdiction of this Honorable Court.

EIGHTH: That libellant is a seaman, within the designation of persons permitted to sue herein without furnishing Bond for or prepayment of or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 837, U. S. C. A.

NINTH: That all and singular the premises are true, and within the Admiralty and maritime jurisdiction of this Honorable Court. In verification whereof, if denied, the libellant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

FOR A SECOND, SEPARATE AND DISTINCT
CAUSE OF ACTION AND LIBEL IN REM
AND IN PERSONAM, LIBELLANT AL-
LEGES AS FOLLOWS:

FIRST: Libellant refers to, incorporates herein and makes a part hereof, as if fully set forth herein, para-

graphs [21] First, Second, Third, Fourth, Seventh, Eighth and Ninth of the First Cause of Action in this Third Amended Libel.

SECOND: That while this libellant has been confined and unable to work, as the result of the injuries as aforesaid, the said "Betsy Ross" engaged in fishing during the proposed Tuna and Sardines seasons for which libellant was employed, and during the said seasons, the vessel took and caught a great quantity of Tuna and Sardines, which libellant is informed and believes and alleges, that his One-seventeenth lay or share of said catch being worth the sum of Six Thousand (\$6,000.00) Dollars and upwards, which the Master and owners of the said vessel have hitherto refused and still refuse to pay, to the great damage of the libellant. That the full amount of said lay or share was due and payable not later than the 15th day of March, 1943; and libellant is entitled to interest thereon at 7% per annum from its due date until paid.

FOR A THIRD, SEPARATE AND DISTINCT CAUSE OF ACTION AND LIBEL IN PERSONAM, LIBELLANT ALLEGES AS FOLLOWS:

FIRST: Libellant refers to, incorporates herein, and makes a part hereof, as if fully set forth herein, paragraphs First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth of the First Cause of action in this Third Amended Libel.

SECOND: That at all times herein mentioned Peter Cekalovich, Dominic Mratinich and Frank Muljat were and are the owners of the Diesel Screw "Betsy Ross".

THIRD: That the said accident, as set forth in paragraph Third of libellant's First Cause of Action, and made a part hereof by reference, was caused, without any contributing fault or neglect on the part of libellant, and as a proximate result of the combined negligence of the Crescent Warehouse Company, and the negligence of Frank Muljat, part owner and member of the crew of the Diesel Screw "Betsy Ross", and the negligence of the said vessel in the [22] following, among other particulars, which will be pointed out on the trial of this action:

(1) By Frank Muljat negligently and carelessly pushing over a 4 by 4 inch timber approximately 16½ feet in length, which was standing on one of *it's* ends, unfastened and leaning against the interior wall of the Warehouse of the Crescent Warehouse Company, where libellant had been instructed to assist in moving a net to the "Betsy Ross", and as the direct and proximate cause of defendant Frank Muljat negligently and carelessly pushing over the aforesaid timber, without any warning, striking libellant upon the head;

(2) By the negligent failure of Frank Muljat, part owner and member of the crew of the Diesel Screw "Betsy Ross", to give libellant warning of the falling timber;

(3) By the negligent pushing against or leaning against an unfastened timber, which was standing on end and leaning against the side of the aforesaid warehouse, by respondent Frank Muljat, causing said timber to fall upon the head of libellant herein, while libellant was engaged in duties in the service of the "Betsy Ross".

(4) In that the vessel, its Master and owners failed to provide libellant with a safe place to work.

FOURTH: That by reason of the premises herein and the accident as aforesaid, libellant sustained severe bodily injuries to his head and entire nervous system; that as a result thereof he has been totally disabled and incapacitated from work since the date of his injuries; and libellant is informed and believes and therefore alleges that he will be unable to return to his work as a seaman or any other employment for an indeterminate period of time.

FIFTH: That libellant is informed and believes, and therefore alleges that the injuries so sustained are permanent in their character.

SIXTH: That libellant is married and lives with and [23] supports his wife; and up until the accident set forth herein, libellant earned approximately Forty (\$40.00) Dollars per week in cannery work.

SEVENTH: That by reason of the premises herein, libellant has been generally damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

WHEREFORE: Libellant prays that process in due form of law according to the course of this Honorable Court in cases of Admiralty and Maritime jurisdiction, may issue against the said Diesel Screw "Betsy Ross", her *tackel*, apparel, furniture; and that Peter Cekalovich, Master of said vessel, and all persons having any right, title or interest in said vessel, her *tackel*, apparel or furniture, may be cited to appear and answer all matters aforesaid, and that this Honorable Court may be pleased to decree the payment of wages, maintenance and cure, and damages aforesaid, with costs, and that the said vessel may be condemned and sold to pay the same, and that libellant may have such other relief in the premises, as in law and justice he may be entitled to receive.

DAVID A. FALL

DAVID A. FALL

Proctor for Libellant

388 W. 7th Street

San Pedro, California

Phone: Harbor 2811 [24]

[Verified.]

[Endorsed]: Filed Jul 10, 1943. [25]

[Title of District Court and Cause.]

ANSWER TO THIRD AMENDED LIBEL IN
REM AND IN PERSONAM

Come now the respondents and answer the third amended libel on file herein as follows:

I.

Answering the allegations contained in the First Article in the first cause of action, respondents admit that on or about the 3rd day of May, 1942, the Diesel Screw "Betsy Ross", was lying in the Port of Los Angeles and respondents admit that on or about said date Peter Cekalovich hired the libellant as a seaman-fisherman on a 1/17th lay or share of whatever fish should be taken during the period in which the libellant was serving the vessel as a seaman-fisherman. Respondents admit that on or about the said 3rd day of May, 1942, the libellant entered into his duties as a member of the crew of the said "Betsy Ross". [26]

Respondents deny each and every other and remaining allegation in the First Article except as has been heretofore expressly admitted.

Further answering said First Article, respondents allege that libellant was hired as a seaman-fisherman on a contract which was terminable at the will of either party. Respondents deny that the "Betsy Ross" was destined for an eleven months' Tuna and Sardine fishing season and in that respect allege that the Tuna and Sardine fishing seasons covered a period of approximately nine months.

II.

Respondents deny each and every allegation contained in the Third Article in the first cause of action.

III.

Respondents have no information or belief upon the subject sufficient to enable them, or any of them, to answer the allegations contained in the Fourth Article in said first cause of action, and placing their denial upon said ground, deny said allegations and each thereof.

IV.

Respondents have no information or belief upon the subject sufficient to enable them, or any of them, to answer the allegations contained in the Fifth Article in said first cause of action, and placing their denial upon said ground, deny said allegations and each thereof.

V.

Respondents deny each and every allegation contained in the Sixth Article in said first cause of action and respondents deny that the reasonable amount accrued for support to the date of the filing of the third amended libel was or is the sum of \$1098 or any other sum whatsoever or at all. [27]

VI.

Respondents deny each and every allegation contained in the Eighth Article in said first cause of action.

VII.

Respondents deny each and every allegation contained in the Ninth Article in said first cause of action.

Respondents answer the Second, Separate and Distinct Cause of Action in said third amended libel, as follows:

I.

Answering the First Article in said second cause of action, respondents incorporate herein by reference thereto, their answer to the first cause of action and by such reference make the same a part hereof with the same force and effect as though said answer were set forth herein in full.

II.

Respondents deny each and every allegation contained in the Second Article in said second cause of action except that respondents admit they have refused and still refuse to pay to the libellant the sum of \$6,000 or any other sum, and in this respect respondents deny that there is now due or owing or unpaid to the libellant the sum of \$6,000 or any other sum whatsoever or at all. Respondents deny that said sum, or any other sum, was due or payable not later than the 15th day of March, 1943, or at any other time. Respondents deny that the libellant is entitled to a 1/17th lay or share, or any other percentage of the lay or share of the catch of the "Betsy Ross".

Respondents answer the Third, Separate and Distinct Cause of action in said third amended libel, as follows: [28]

I.

Answering the First Article in said third cause of action, respondents incorporate herein by reference

thereto their answer to the first cause of action and by such reference make the same a part hereof with the same force and effect as though said answer were set forth herein in full.

II.

Respondents deny each and every allegation contained in the Third Article and in each and every subdivision thereof.

III.

Respondents deny each and every allegation contained in the Fourth Article in said third cause of action.

IV.

Respondents have no information or belief upon the subject sufficient to enable them, or any of them, to answer the allegations contained in the Fifth Article in said third cause of action, and placing their denial upon said ground, deny said allegations and each thereof.

V.

Respondents have no information or belief upon the subject sufficient to enable them, or any of them, to answer the allegations contained in the Sixth Article in said third cause of action, and placing their denial upon said ground, deny said allegations and each thereof.

VI.

Answering the Seventh Article, respondents deny that libellant has been damaged in the sum of \$15,000 or in any other sum whatsoever or at all.

As and for a Separate and Special Defense to the allegations contained in the third cause of action, respondents allege that the libellant negligently and carelessly failed and neglected to perform work which he was doing in an ordinarily skillful manner and [29] negligently and carelessly failed to conduct himself in an ordinarily careful and prudent manner in and about the management of his person and that any injuries or damage sustained by the libellant were a proximate result of said carelessness and negligence on his part.

Wherefore, respondents pray that this Honorable Court dismiss the third amended libel and that these respondents have judgment against the libellant for their costs of suit, proctor's fees and for such other or further relief as may be proper.

HENRY E. KAPPLER

Henry E. Kappler

Proctor for Respondent. [30]

[Verified.]

(Affidavit of Service by Mail)

[Endorsed]: Filed Aug. 12, 1943. [31]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 20th day of December in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

Steve Ruljanovich,

Libelant,

vs

No. 2693-O'C Adm.

"Betsy Ross", et al.,

Respondents.

This cause coming before the Court at the hour of 1:45 P.M. for further proceedings; David A. Fall, Esq., appearing as proctor for the Libelant; Henry E. Kappler, Esq., appearing for the Respondents and Claimants, there being no Court Reporter present:

Attorney Kappler moves the Court to set aside the stipulation and order heretofore entered into that judgment be entered in favor of the Libelant for \$6,000.00; and the said motion having been granted and Attorney Fall having asked permission to dismiss Libelant's third cause of action in the libel, and counsel for the respective parties having argued the value of maintenance and cure, it is by the Court ordered that the motion of the Libelant to dismiss the third cause of action be denied, and that judgment be entered against the Libelant on the third cause of action; and thereupon, the

Court allows Libelant the sum of \$5,050.46, which would have been his part of the "catch"; also doctor's bills and medicines of \$94.90 and approximately eleven months for maintenance and cure at \$2.50 per day, amounting to \$825.00, or in all the sum of \$5,970.36, with stay of execution allowed on judgment for 20 days, and counsel for the Libelant is instructed to prepare decree in favor of the Libelant for that amount.

37/210. [32]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW.

This cause having come on regularly to be heard on the pleadings and proofs, and having been argued and submitted by the advocates for the respective parties, the court finds the facts as follows:

I.

That it is true that on or about the 3rd day of May, 1942, the Diesel screw "Betsy Ross", then lying in the Port of Los Angeles, destined for a nine months Tuna and Sardine Fishing seasons, and the then Master, Peter Cekalovich, by himself, hired libelant Steve Ruljanovich as a fisherman seaman for the said seasons on the one-seventeenth lay or share of what should be taken, as wages, and this libelant Steve Ruljanovich then accepted and entered into his duties as a member of the crew of the said "Betsy Ross".

II.

That it is true that on the 4th day of May, 1942, this libelant entered into the duties as a member of the crew of said ship. [33]

III.

That it is true that on the 4th day of May, 1942, while the libelant was engaged in the service of said ship, and while doing his duty and obeying the commands of the Master of the "Betsy Ross", libelant was struck on the head by a heavy timber, while at a warehouse located at Terminal Island, at the Port of Los Angeles, for the purpose of bringing the ship's net from the said warehouse to the "Betsy Ross"; and that by reason of being struck upon the head, as aforesaid, libelant sustained a cerebral concussion, scalp laceration and damage to a denture in his mouth.

IV.

That it is true that as a result of said injuries, as aforesaid, libelant was confined to a hospital for a period [J.F.T. O'C Judge]

of one week and was ~~totally~~ disabled from the 4th day of May, 1942, to and including the 5th day of April, 1943.

V.

That as a result of the injuries as aforesaid, libelant was under the care of duly licensed physicians and incurred liability in the reasonable sum of \$94.90 for the services of said physicians and surgeons and the medication prescribed by them for treatment of the aforesaid injuries. The sum of \$21.40 was incurred for medication and the sum of \$73.50 for physicians and surgeons.

VI.

That it is true that by reason of the disability from the injuries as aforesaid, libelant is entitled to demand and have the said ship pay his reasonable expenses incurred in and about his support, from May 11, 1942 to April 5, 1943, inclusive, which said sum is at the rate of \$2.50 per day, and that the amount due libelant therefore is \$825.00.

VII.

That it is true that the said Diesel Screw "Betsy Ross" is an American vessel and was during the currency of process herein, within the District of Southern California, and within the jurisdiction of this Honorable Court. [34]

VIII.

That it is true that libelant is a seaman, within the designation of persons permitted to sue herein without furnishing Bond for or prepayment of or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Section 837, U.S.C.A.

IX.

That it is true that all and singular the premises are true, and within the Admiralty and maritime jurisdiction of this Honorable Court.

X.

That it is true while this libelant was so confined and unable to work by reason of the injuries sustained

as aforesaid, the said ship engaged in fishing from on or about the 4th day of May, 1942 to on or about the 15th day of February, 1943, the period of the proposed Tuna and Sardine fishing seasons for which libelant was employed and during the said seasons the said ship took and caught a great quantity of Tuna and Sardines, of which the libelant's one-seventeenth lay or share was worth the sum of \$5,050.46, which the master and owners of the said ship refused to pay the libelant.

XI.

[Not Found J.F.T. O'Connor Judge]

That the allegations of the paragraphs referred to in paragraph First of the Third Cause of Action are true.

XII.

That the allegations of paragraph Second of the Third Cause of Action are true.

XIII.

That it is true that the accident, as set forth in paragraph III of libelant's First Cause of Action was without any contributing fault or neglect on the part of the libelant, but it is not true that it was a proximate result or the proximate result of the negligence of Frank Muljat, part owner and member of the crew of said vessel. That the allegations of subdivisions (1), (2), (3) and (4) and each and every allegation contained therein of paragraph Third of libelant's Third

[J.F.T. O'Connor Judge]

Cause of Action, are ~~not~~ untrue. [35]

XIV.

That it is not true that libellant has been generally damaged in the sum of Fifteen Thousand Dollars, or any part thereof by reason of his Third Cause of Action.

XIV.

That it is not true that libelant negligently and carelessly failed and neglected to perform work which he was doing in an ordinarily skillful manner, and it is not true that libelant negligently and carelessly failed to conduct himself in an ordinarily careful and prudent manner in and about the management of his person, and it is not true that libelant was negligent or careless in any respect, and it is not true that the injuries sustained by him were the proximate result of any carelessness and or negligence on his part. That each and all of the allegations of respondents' Separate and Special Defense are not true.

From the foregoing, the court concludes that:

I.

The libelant is entitled to a judgment against respondents and claimants in the sum of Five Thousand Fifty and 46/100 (\$5,050.46) as wages for the Tuna and Sardine seasons ending on the 15th day of February, 1943, with interest thereon from February 15, 1943, at the rate of 7% per annum, and for the additional sum of \$825.00, as maintenance from May 11, 1942 to April 5, 1943, with interest therefrom from April 6, 1943, at the rate of Seven (7%) per cent per annum, and for the additional sum of \$94.90 for medical expenses.

II.

That libelant is not entitled to recover upon his Third Cause of Action for damages for the injuries sustained by him.

III.

That upon motion of libelant a Final Decree shall be entered in accordance herewith providing therein that the decree be satisfied or an appeal be taken within ten days after service of Notice of Entry of said decree on the claimants or their proctor, or the [36] stipulators for costs and value on the part of the said Diesel Screw "Betsy Ross", shall cause the engagements of their stipulations to be performed, or show cause within four days after said ten days, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels and lands, to satisfy the decree.

Dated: December 23, 1943.

J. F. T. O'CONNOR
United States District Judge.

Judgment entered Dec. 23, 1943. Docketed Dec. 23, 1943. CO Book 22, page 497. Edmund L. Smith, Clerk. By Louis J. Somers, Deputy.

[Endorsed]: Filed Dec. 23, 1943. [37]

In the United States District Court, Southern District
of California, Central Division.

IN ADMIRALTY
No. 2693 OC

STEVE RULJANOVICH,

Libelant,

-vs-

DIESEL SCREW "BETSY ROSS," her tackel, apparel, engines and furniture, and PETER CEKALOVICH, Master of said vessel, and PETER CEKALOVICH, DOMINIC MRATINICH and FRANK MULJAT, her owners,

Respondents.

FINAL DECREE

This cause having come on regularly to be heard on the pleadings and proofs, and having been argued and submitted by the advocates for the respective parties, and due deliberation having been had, it is now, on motion of David A. Fall, Proctor for libelant,

Ordered, Adjudged and Decreed, that the libelant recover of and from the respondents herein the sum of Five Thousand Fifty and 46/100 (\$5,050.46) Dollars, with interest thereon from the 15th day of February, 1943 at 7% per annum, amounting to \$302.05; for a further sum of Eight Hundred Twenty-five (\$825.00) Dollars, with interest thereon from April 6, 1943, at seven (7%) per annum, amounting to \$36.81; for the

further sum of \$94.90, and costs of libelant taxed in the sum of \$166.08, all to the sum of \$....., with interest thereon at the rate of seven (7%) per cent, per annum until paid, and it is further

[J.F.T. O'Connor Judge]

Ordered, Adjudged and Decreed that respondents have judgment against libelant upon his Third Cause of Action, and it is [38]

Ordered, Adjudged and Decreed, that unless this decree be satisfied or an appeal taken therefrom within [J.F.T. O'C]

~~ten~~ twenty days after service of Notice of Entry of this decree on the claimants or their proctor, the stipulators for costs and value on the part of the claimants of the said Diesel Screw "Betsy Ross" cause the engagements of their stipulators to be performed, or show cause within four days after said ten days, or on the first day of jurisdiction thereafter, why executions should not issue against them, their goods, chattels and lands, to satisfy this decree.

Dated: December 23, 1943.

J. F. T. O'CONNOR
United States District Judge.

Approved as to form only as provided in Rule 44.

HENRY E. KAPPLER
Proctor for Claimants and Respondents.

Judgment entered Dec. 23, 1943. Docketed Dec. 23, 1943. CO Book 22, page 502. Edmund L. Smith, Clerk. By Louis J. Somers, Deputy.

[Endorsed]: Filed Dec. 23, 1943. [39]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable J. F. T. O'Connor, Judge of the United States District Court, Southern District of California, Central Division:

Respondents and claimants, Diesel Screw "Betsy Ross", Peter Cekalovich, Dominic Mratinich and Frank Muljat, and each of them, respectfully pray that they and each of them may be permitted to take an appeal from the final decree entered in the above Court on the 23rd day of December, 1943, in favor of the libellant and against the respondents and claimants, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the Assignments of Error which is filed herewith and your petitioners desire to supersede the execution of said final decree, and herewith tender a bond in such amount as the Court may require [40] for such purpose, and pray that a supersedeas be allowed as part of the allowance of said appeal and the amount of the bond fixed so as to operate as a supersedeas.

Dated at Los Angeles, California, this 20th day of January, 1944.

Henry E. Kappler

Henry E. Kappler

Proctor for Respondents and Claimants.

[Endorsed]: Filed Jan. 21, 1944. [41]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The petition of respondents and claimants, Diesel Screw "Betsy Ross", Peter Cekalovich, Dominic Martinich and Frank Muljat, for an appeal from the final decree entered in the above entitled cause on the 23rd day of December, 1943, in favor of the libellant and against the respondents and claimants, is hereby granted and the appeal is allowed.

It Is Further Ordered that a certified transcript of the record herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit; and

It Is Further Ordered that upon petitioners filing a bond in the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars, with sufficient surety or sureties and conditioned as required by [42] law, the same shall operate as a supersedeas of the decree made and entered in the above cause, and shall suspend and stay all further proceedings in this court until the determination of said appeal to the said United States Circuit Court of Appeals.

Dated at Los Angeles, California, this 21st day of January, 1944.

J. F. T. O'Connor
United States District Judge.

[Endorsed]: Filed Jan. 21, 1944. [43]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The respondents and claimants, Diesel Screw "Betsy Ross", Peter Cekalovich, Dominic Mratinich and Frank Muljat, and each of them, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court entered herein on the 23rd day of December, 1943, in favor of the libellant and against the respondents and claimants.

Dated: January 20th, 1944.

Henry E. Kappler

Henry E. Kappler

Proctors for Respondents and Claimants.

[Endorsed]: Filed Jan. 21, 1944. [44]

[Title of District Court and Cause.]

NOTICE OF FILING BOND ON APPEAL

To the libellant and to his Proctor David A. Fall, Esq.:

You and Each of You Will Please Take Notice that the bond on the appeal herein was approved by the Honorable J. F. T. O'Connor, and was filed in the office of the Clerk of the District Court of the United States, for the Southern District of California, Central Division, on the 21st day of January, 1944, and said bond was executed and given by the Fireman's

Fund Indemnity Company, a corporation, authorized to execute surety bonds pursuant to the laws of the State of California and said bond is by reference thereto made a part hereof and a copy of said bond is attached hereto and marked Exhibit "A".

Dated: Los Angeles, California, this 22nd day of January, 1944.

HENRY E. KAPPLER
Henry E. Kappler,
Proctor for Respondents and Claimants. [45]

EXHIBIT "A"

In the United States District Court Southern District of California Central Division

Steve Ruljanovich, Libellant vs. Diesel Screw "Betsy Ross", etc., Peter Cekalovich, etc., and Peter Cekalovich, Dominic Mratinich and Frank Muljat, her owners, Respondents In Admiralty No. 2693 O'C.

BOND ON APPEAL (Supersedeas and for Costs)

Know All Men By These Presents:

Whereas, respondents and claimants, Diesel Screw "Betsy Ross", Peter Cekalovich, Dominic Mratinich and Frank Muljat have, and each thereof has appealed or is about to appeal from that certain final decree heretofore made and entered in the above entitled cause on the 23rd day of December, 1943, in favor of the libellant and against said respondents and claimants; and

Whereas, Firemen's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the libellant herein and unto whom it may concern, in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns firmly by these [46] presents and agrees that in case of default or contumacy on the part of the said appellants, Diesel Screw "Betsy Ross", Peter Cekalovich, Dominic Mratinich or Frank Muljat, execution may issue against it, its goods, chattels and lands;

Now, Therefore, the condition of this obligation is such that if the above named appellants shall prosecute their appeal with effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, this 20th day of January, 1944.

FIREMAN'S FUND INDEMNITY COMPANY

By A. I. STODDARD

A. I. Stoddard

Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 13.

HENRY E. KAPPLER

Henry E. Kappler

Proctor for Appellants.

State of California

County of Los Angeles—ss.

On this 20th day of January, 1944, before me, M. E. Beeth, a Notary Public in and for said..... County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared A. I. Stoddard, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

[Seal]

M. E. BEETH,

Notary Public in and for the County of Los Angeles,
State of California.

My commission expires March 23, 1945.

I hereby approve the foregoing bond this 21st day of January, 1944.

J. F. T. O'CONNOR
United States District Judge.

Received copy of the within Notice of Filing Bond on Appeal this 25th day of January, 1944.

DAVID A. FALL
Proctor for Libellant.

[Endorsed: Filed Jan. 25, 1944. [47]]

[Title of District Court and Cause.]

BOND ON APPEAL
(Supersedeas and for Costs)

Know All Men By These Presents:

Whereas, respondents and claimants, Diesel Screw "Betsy Ross", Peter Cekalovich, Dominic Mratinich and Frank Muljat have, and each thereof has appealed or is about to appeal from that certain final decree heretofore made and entered in the above entitled cause on the 23rd day of December, 1943, in favor of the libellant and against said respondents and claimants; and

Whereas, Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the libellant herein and unto whom it may concern, in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns firmly by these presents and agrees that in case of default or contumacy on the part of the said appellants, Diesel Screw "Betsy Ross", Peter Cekalovich, Dominic Mratinich or Frank Muljat, execution may issue against it, its goods, chattels and lands;

Now, Therefore, the condition of this obligation is such that if the above named appellants shall prosecute their appeal with [48] effect and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, this 20th day of January, 1944.

FIREMAN'S FUND INDEMNITY COMPANY
[Seal]

By A. I. Stoddard

A. I. Stoddard

Attorney-in-Fact.

State of California

Los Angeles County of—ss.

On this 20th day of January, 1944, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared A. I. Stoddard known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the saidCounty of Los Angeles the day and year in this certificate first above written.

[Seal]

M. E. BEETH,

Notary Public in and for the.....County of Los Angeles State of California.

My commission expires March 23, 1945.

Examined and recommended for approval as provided in Rule 13.

Henry E. Kappler

Henry E. Kappler

Proctor for Appellants.

I hereby approve the foregoing bond this 21 day of January, 1944.

J. F. T. O'CONNOR
United States District Judge

The premium charged for this bond is \$150.00 Dollars per annum.

[Endorsed]: Filed Jan. 21, 1944. [49]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Now come the respondents and claimants, and each thereof, and hereby assign the following errors in the above entitled proceedings:

I.

The District Court erred in finding that the subject matter of the first cause of action set forth in the third amended libel was within the Admiralty jurisdiction of the United States District Court, for the reason that the exclusive remedy of the libellant was and is within the exclusive jurisdiction of the Industrial Accident Commission of the State of California or the United States Employees' Compensation Commission.

II.

The District Court erred in finding that the subject [50] matter of the second cause of action set forth in the third amended libel was within the Admiralty jurisdiction of the United States District Court, for the reason that the exclusive remedy of the libellant was and is within the exclusive jurisdiction of the Industrial Accident Commission of the State of California or the United States Employees' Compensation Commission.

III.

The District Court erred in finding that the libellant was disabled from May 4th, 1942, to and including April 5th, 1943.

IV.

The District Court erred in concluding that the libellant was entitled to the sum of \$94.90, or any other sum in excess of the sum of \$33.00, as or for medical care or attention or medicines.

V.

The District Court erred in finding that the reasonable expenses incurred by the libellant for his support from May 11, 1942, to April 5, 1943, amounted to the sum of \$2.50 per day, or any other sum per day in excess of the sum of \$1.25.

VI.

The District Court erred in concluding that the libellant was entitled to recover the sum of \$825.00 as and for maintenance.

VII.

The District Court erred in finding that the libellant was entitled to recover the sum of \$5,050.46, for a 1/17th lay or share of the catch for both the Tuna and Sardine fishing seasons, when the evidence was undisputed that the libellant sustained his injuries prior to the commencement of the Tuna season.

VIII.

The District Court erred in finding that the libellant was entitled to a 1/17th lay or share of the fish caught and sold during the Sardine season. [51]

IX.

The District Court erred in refusing to find that the award made in favor of the libellant in the pro-

ceedings commenced before the Industrial Accident Commission of the State of California, was a bar to libellant's first and second causes of action in the third amended libel in the United States District Court.

X.

The District Court erred in finding that the libellant was entitled to any maintenance whatever for any period of time whatever.

XI.

The District Court erred in finding that the libellant was injured while in the service of the ship.

XII.

The District Court erred in finding that the libellant is a seaman within the designation of persons permitted to sue without furnishing bond for or prepayment of or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Section 837, U.S.C.A.

XIII.

The District Court erred in finding that all and singular the premises are true and within the Admiralty and Maritime jurisdiction of said Court.

XIV.

The District Court erred in finding that the Diesel Screw "Betsy Ross" engaged in fishing from on or about the 4th day of May, 1942 to on or about the 15th day of February, 1943.

XV.

The District Court erred in finding that on or about the 3rd day of May, 1942, the Diesel Screw "Betsy Ross" was destined for a nine months Tuna and Sardine fishing seasons. [52]

XVI.

The District Court erred in finding that the libellant was entitled to any sum whatsoever upon either the first or second causes of action set forth in the third amended libel.

XVII.

The District Court erred in finding that the libellant was entitled to a decree against the respondents and claimants, or any of them, in the sum of \$5,050.46, or any other sum whatsoever or at all, upon the second cause of action set forth in the third amended libel.

XVIII.

The District Court erred in finding that the libellant was entitled to recover the sum of \$919.90, or any other sum whatsoever or at all, upon the first cause of action set forth in the third amended libel.

XIX.

The District Court erred in not concluding that the libellant was not entitled to recover any sum whatsoever or at all from the respondents and claimants, or any of them, and in not concluding that the third amended libel should be dismissed with costs in favor of the respondents and claimants.

Dated: Los Angeles, California, this 20th day of January, 1944.

Henry E. Kappler

Henry E. Kappler

Proctor for Respondents and Claimants.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above entitled Court:

I hereby request that the record on appeal in the above entitled cause include the following:

1. Second Amended Libel in Rem and in Personam.
2. Claim of Peter Cekalovich, Dominic Mratinich and Frank Muljat.
3. Order releasing Diesel Screw "Betsy Ross", her tackel, apparel, engines and furniture to claimants.
4. Exceptions to Second Amended Libel and Memorandum of Points and Authorities attached thereto.
5. Minute Order of June 14th, 1943, ruling on Exceptions to Second Amended Libel.
6. Third Amended Libel.
7. Answer to Third Amended Libel. [54]
8. Findings of Fact and Conclusions of Law.
9. Final Decree.
10. Petition for Appeal.
11. Assignment of Errors.
12. Order Allowing Appeal.
13. Supersedeas and Cost Bond.
14. Notice of Appeal.
15. Citation and acknowledgment of service of copy of citation, petition for appeal, notice of appeal and assignment of errors.
16. Notice of Filing Bond on Appeal and Acknowledgment of service of copy thereof.
17. Testimony of Libellant taken in Court of:
 1. Steve Ruljanovich.
 2. Dorrell G. Dickerson.
 3. Dr. Eddie Monroe Gordon.

4. Milica Ruljanovich.
5. Clark B. Watsworth.
6. Peter Cekalovich.
18. Libellant's Exhibits Nos. 1, 2 and 3.
19. Testimony of Respondents and Claimants taken in Court of:

1. Carl R. Bishop.
2. Winter W. Christian.
3. Deposition of Steve Ruljanovich (Read into evidence at pages 160 to 201 inclusive, Reporter's Transcript filed herewith).

4. Nick Karuza.
20. The respondents' Exhibits A and E.
21. That portion of Minute order of December 20th, 1943, entering judgment in favor of libellant on the first and second causes of action and in favor of respondents and claimants on the third cause of action of the Third Amended Libel. [55]

22. All written stipulations which have been or shall be entered into by and between proctors for the respective parties, and orders of the United States District Court based thereon, prior to the completion and transmittal of the Record on Appeal to the Clerk of the Circuit Court of *Appeal*, and which said written stipulations are not contained in the Reporter's Transcript.

23. This Praecipe and Affidavit of Service by Mail.
- The respondents and claimants file herewith the original and one copy of Reporter's Transcript.

Dated: Los Angeles, California, this 14th day of February, 1944.

HENRY E. KAPPLER

HENRY E. KAPPLER

Proctor for Respondents and Claimants. [56]

(AFFIDAVIT OF SERVICE BY MAIL—
1013a, C. C. P.)

State of California,
County of Los Angeles—ss.

Roy Keown, being first duly sworn says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 424 So. Broadway, Los Angeles, California; that on the 14th day of February, 1944, affiant served the within Praeceptum on the Libellant in said action, by placing a true copy thereof in an envelope addressed to the proctor of record for said libellant at the office address of said proctor, as follows: "David A. Fall, Esq., 388 West 7th Street, San Pedro, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the proctor for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

Roy Keown

Subscribed and sworn to before me this 14th day of February, 1944.

[Seal]

Enes Sarvello

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Feb. 14, 1944. [57]

[Title of District Court and Cause.]

POINTS UPON WHICH APPELLEE INTENDS
TO RELY UPON THE APPEAL

Now comes the libellant, and hereby assigns the following errors in the above entitled proceedings.

I.

The District Court erred in finding that it is not true that the injury sustained by Steve Ruljanovich was a proximate result of or the proximate result of the negligence of Frank Muljat, part owner and member of the crew of the Diesel Screw "Betsy Ross."

II.

The District Court erred in finding that it was not true that Frank Muljat negligently and carelessly pushed over a 4 by 4 inch timber approximately 16½ feet in length, which was standing on one of its ends, unfastened and leaning against the interior wall of the Warehouse of the Crescent Warehouse Company, where libellant had been instructed to assist in moving a net to the "Betsy Ross", and as the direct and proximate result of Respondent Frank Muljat negligently and carelessly pushing over the aforesaid timber, without any warning, striking the libellant on the head. [58]

III.

The District Court erred in finding "That the allegations of subdivisions (1), (2), (3) and (4), and each and every allegation contained therein of paragraph Third of libellant's Third Cause of Action are untrue."

IV.

That the District Court erred in finding "That it is not true that libellant has been generally damaged in

the sum of Fifteen Thousand Dollars, or any part thereof by reason of his Third Cause of Action."

V.

That the District Court erred in not finding that libellant was generally damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars or a substantial part thereof.

VI.

That the District Court erred in not finding that the allegations contained in subdivisions (1), (2) and (3) of paragraph Third of libellant's Third Cause of Action are true.

VII.

That the District Court erred in finding "That it is not true that libellant has been generally damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars, or any part thereof by reason of his Third Cause of Action.

VIII.

That the District Court erred in concluding "That libellant is not entitled to recover upon his Third Cause of Action for damages for the injuries sustained by him."

IX.

That the District Court erred in not concluding that libellant sustained general damages in the sum of Fifteen Thousand (\$15,000.00) Dollars or a substantial part thereof.

DAVID A. FALL

Proctor for Libellant.

Dated: San Pedro, California, this 2nd day of February, 1944. [59]

State of California,
County of Los Angeles,—ss.

Marion M. Fall being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 388 W. 7th St. San Pedro, California, that on the 2nd day of February, 1944, affiant served the within Points Upon Which Appellee Intends to Rely Upon Appeal on the Respondent in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Respondent at the office address of said attorney, as follows: "Henry E. Kappler, Attorney at Law, 639 South Spring Street, Los Angeles, 14, California"; and by then sealing said envelope and depositing the same, with postage thereon duly prepaid, in the United States Post Office at San Pedro, City of Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or/and there is a regular communication by mail between the place of mailing and the place so addressed.

MARION M. FALL

Subscribed and sworn to before me this 2nd day of February, 1944.

(Seal)

DAVID A. FALL

Notary Public in and for the County of Los Angeles,
State of California

[Endorsed]: Filed Feb. 3 - 1944. [60]

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS AND
REPORTER'S TRANSCRIPT

It Is Hereby Stipulated that the original exhibits in the above entitled cause and the original Reporter's Transcript need not be reproduced or otherwise incorporated in the record on appeal to be transmitted to the Clerk of the Circuit Court of Appeals, for the Ninth Circuit, by the Clerk of the United States District Court and that the originals of said exhibits and the original Reporter's Transcript may be transmitted to the Clerk of the Circuit Court of Appeals, for the Ninth Circuit, to be there considered as part of the record on appeal required to be sent from the United States District Court to the Circuit Court of Appeals, with the same force and effect as though the same were and each thereof was reproduced and thus incorporated in the record on appeal.

Dated: March 1st, 1944.

David A. Fall

David A. Fall

Proctor for Libellant. [61]

Henry E. Kappler

Henry E. Kappler

Proctor for Respondents and Claimants

It Is So Ordered.

Dated:1944.

J. F. T. O'Connor

United States District Judge.

[Endorsed]: Filed Mar. 2 - 1944. [62]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO PRE-
PARE AND FILE APOSTLES ON APPEAL
AND ORDER THEREON.

It Is Hereby Stipulated that Respondents and Claimants may have to and including the 13th day of March, 1944 within which to prepare and file the Apostles on Appeal in the above entitled cause.

Dated: March 1st, 1944.

David A. Fall

David A. Fall

Proctor for Libellant

Henry E. Kappler

Henry E. Kappler

Proctor for Respondents and Claimants.

It Is So Ordered.

Dated: March 2, 1944.

J. F. T. O'Connor

United States District Judge [63]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 63 inclusive contain the original Citation and full, true and correct copies of: Second Amended Libel; Claim; Stipulation filed Mar. 25, 1943; Order filed Mar. 25, 1943; Exceptions to Second Amended Libel; Minute Order Entered June 14, 1943; Third Amended Libel; Answer to Third Amended Libel; Minute Order Entered Dec. 20, 1943; Findings of Fact and Conclusions of Law; Final Decree; Petition for Appeal; Order Allowing Appeal; Notice of Appeal; Notice of Filing Bond on Appeal; Bond on Appeal; Assignments of Error; Praecipe; Points Upon which Appellee Intends to Rely upon the Appeal; Stipulation and Order re Exhibits and Reporter's Transcript and Stipulation and Order Extending Time to Prepare and File Apostles on Appeal which, together with original Libellant's Exhibits 1, 2 and 3 and Respondents' Exhibits A and E and original Reporter's Transcript, transmitted herewith, constitute the Apostles on Appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing apostles amount to \$13.35 which sum has been paid to me by Appellant.

Witness my hand and the seal of said District Court this 9th day of March, 1944.

[Seal]

EDMUND L. SMITH,

Clerk

By Theodore Hocke

Deputy Clerk

In the District Court of the United States,
Southern District of California,

Central Division.

Before Hon. J. F. T. O'Connor, Judge.

STEVE RULJANOVICH,

Libelant,

vs.

PETER CEKALOVICH, et al.,

Respondents.

No. 2693—O'C—Adm.

REPORTER'S TRANSCRIPT
OF
TESTIMONY AND PROCEEDINGS ON TRIAL.

APPEARANCES:

For Libelant: David A. Fall, Esq.

For Respondent: Henry E. Kappler, Esq.

Los Angeles, California, Thursday, December 16,
1943. 10 A. M.

Mr. Kappler: At this time, your Honor, might I, at least for my record, make the preliminary objection that the court has no jurisdiction to proceed with this matter for the reason that the Industrial Accident Commission of the State of California is the tribunal vested with the sole and exclusive jurisdiction over any injuries which this man might have sustained?

In support of my objection, your Honor, I would like to offer in evidence a copy of the Application for Ad-

justment of Compensation, which was filed by the libelant in this matter with the Industrial Accident Commission on the same date that this libel was filed in this court.

I take it the court, of course, will overrule my objection, in view of the fact that we threshed this matter out at a prior time, but I think I should raise it at this time so the matter will appear in the record.

(Discussion.)

Mr. Kappler: In support of this motion, your Honor, I would like to offer in evidence a copy of the application for adjustment of compensation. With your Honor's permission I would like to take that copy out of the certified copy of the entire record which I have received from the Industrial Accident Commission.

The Court: No objection. [2*]

Mr. Fall: We wish to interpose an objection upon the ground that it is incompetent, irrelevant, and immaterial, and not tending to prove or disprove any issue before the court.

The Court: Proceed.

Mr. Fall: Was the application admitted?

The Court: Yes.

Mr. Fall: May we have an exception?

The Court: Yes, you have an exception.

The Clerk: This will be marked Respondent and Claimant's Exhibit A.

*Page numbering appearing at top of page of original Reporter's Transcript.

RESPONDENTS AND CLAIMANTS' EXHIBIT
NO. A.

San Francisco Office
119 State Building

Los Angeles Office
602 State Building

State of California
Department of Industrial Relations
Industrial Accident Commission

APPLICATION FOR ADJUSTMENT OF CLAIM
NO. 62423

Received 1/19/43

Received 1/19/43

Steve Ruljanovich

642 W. 14th Street,
San Pedro Cal.

Applicant—

Applicant's Address

vs.

Peter Cekalovich, Dominic
Mratinich, Frank Muljat,
Diesel Screw "Betsy Ross"

642 W. 14th Street,
San Pedro Cal.

Employer

Employer's Address

John H. Black

742 Broad Ave.

Wilmington, Calif.

Employer's Insurance Carrier

Insurance Carrier's Address

1. Steve Ruljanovich, 59, while employed as a Seaman
Name of Employee Age When Injured Occupation at Time
Fisherman on May 4, 1942, at Terminal Island
of injury Date of Injury City, Town or Place
California, by Diesel Screw "Betsy Ross" sustained
Where Injury Occurred Name of Employer
injury arising out of and in the course of the em-
ployment, as follows: a timber fell upon the head of
Explain How Injury Was Received

(Respondents and Claimants' Exhibit No. A.)

applicant resulting in Concussion of the brain, lacera-
 State What Parts of Body Were Injured and Subsequent Results
 tion of scalp, contusions of the head, possible skull
 fracture

2. On said date said employer's insurance carrier was
 John H. Black

Name of Insurance Company

3. Injured left work on May 4, 1942, and disability
 continued to Still disabled, 19....

Date Could Have Resumed Work

4. Last payment of indemnity on none paid, 19....;
 last medical furnished by employer on June, 1942.

5. Medical or surgical treatment has been rendered by
 United States Public Health Service, Dr. Dunbar
 and Dr. Cassidy, of San Pedro

Give Name and Address of All Doctors Who Treated or Ex-
 amined, and State by Whom Furnished

6. The employee's date of birth was Oct. 18, 1882 and
 his wages \$......per.....working.....days per week

Day, Week or Month

1/17 share of fishing catch. Average at time about
 \$40.00 per week.

If Board, Lodging, or Other Advantages Were Furnished by the
 Employer Without Charge, State What and Market Value of
 Each

To Be Used in Death Cases Only

7. It is claimed that the deceased left the following
 named dependent.....:

Name	Age	Relationship	Address
.....
.....
.....
.....
.....

.....

.....

.....

.....

.....

(Respondents and Claimants' Exhibit No. A.)

8. A question has arisen with respect to the liability of the employer or insurance carrier, and the general nature of the claim in controversy is: Liability for Compensation and medical expenses
-

Wherefore, It is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

Steve Ruljanovich

Dated at San Pedro, Jan. 19, 1943

David A. Fall

Agent, or Attorney for Applicant

388 W. 7th Street, San Pedro

Address Calif.



STEVE RULJANOVICH

Signature of Applicant or Applicants

NOTE.—Under the provisions of the Workmen's Compensation, Insurance and Safety Laws, the applicant need only state the general nature of the claim in controversy. When application has been filled out and signed by applicant it must be filed with or mailed to the nearest office of the Industrial Accident Commission without delay. Due notice will thereafter be given of the time and place of hearing. Either party may be represented in person, by attorney or other agent.

[Stamped]: 12/16/42.—No. A in evidence.

STEVE RULJANOVICH,

the libelant, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fall:

Mr. Fall: I believe it will be necessary to have an interpreter. We took this man's deposition and had quite a bit of difficulty. Have you any objection to having the Secretary of the Fishermen's Union to interpret?

Mr. Kappler: He has a very good speaking knowledge of English. I don't want anybody from the Fishermen's Union up here to interpret. He understood and answered all the questions I put to him.

Mr. Fall: I am amazed at Mr. Kappler's statement, [3] because one particular question was asked the man ten times before he was able to understand a very simple question.

The Court: The Court will determine that after the man is sworn. If the Court finds he does not understand the English language, we will have an interpreter.

Mr. Fall: I believe it would be very unjust to this man, because of his very limited knowledge.

The Court: We do not know until we find out. Swear the witness.

The Clerk: State your full name.

The Witness: Steve Ruljanovich.

Q. By Mr. Fall: What is your name?

A. Steve Ruljanovich.

(Testimony of Steve Ruljanovich.)

Q. Were you a member of the crew of the "Betsy Ross"? A. Yes, sir.

Mr. Kappler: I move to strike the answer, for the purpose of making an objection. I object to it upon the ground that it calls for a conclusion and opinion of this witness. We can find out, your Honor, what the facts are with reference to his employment, if any.

The Court: I will overrule the objection. Proceed.

Q. By Mr. Fall: When were you hired as a member of the crew of the "Betsy Ross"?

A. The 3rd of May.

Q. Of what year? A. 1942. [4]

Q. Who employed you?

A. Peter Cekalovich.

Q. Was he the master of the "Betsy Ross"?

A. Yes, sir.

Q. You had a conversation with him on the 3rd day of May, 1942? A. Yes.

Q. Where did you have that conversation?

A. He told me about going fishing.

Q. Where was it?

A. The 3rd of May, on Sunday.

Q. Where were you and where was Mr. Cekalovich when you had this conversation? A. Out home.

Q. In San Pedro? A. In San Pedro.

Q. Was anyone else with you at the time?

A. No.

Q. Just you and Mr. Cekalovich? A. Yes.

Q. What did he say to you?

A. He said would I like to go fishing.

(Testimony of Steve Ruljanovich.)

Q. What did you say?

A. I said, "Yes, I like to go fishing with you for tuna and sardines, because I worked in the cannery for the French Sardine, because if you don't give me a chance to [5] fish for sardines I lose my seniority list."

Q. What did he say? A. He says yes.

Q. Did he tell you when you were supposed to start in work? A. We started in next day.

Q. What did he tell you?

A. He told me to go on the boat.

Q. When did he tell you to go on the boat?

A. In the slip.

Q. In this conversation on the 3rd of May, did he tell you when to report on board the boat?

A. Yes; he told me we clean it up a little bit for putting the nets.

Q. On the 3rd of May did he tell you what day you were to come down on the boat?

A. Tomorrow, the 4th of May.

Q. He told you to come down on the 4th of May?

A. Yes.

Q. Did you go down on the 4th of May to the boat?

A. Yes.

Q. What time of the day did you go on the boat?

A. In the morning.

Q. Did you go down to the boat alone or did you go with somebody?

A. I been with him in the machine. [6]

Q. With him—do you mean the captain?

A. The captain.

(Testimony of Steve Ruljanovich.)

Q. Mr. Cekalovich? A. Yes.

Q. When you got down to the boat, what did you do?

A. We cleaned it up a little bit to prepare to put a net.

Q. Who told you to do that?

A. The captain.

Q. Where was the boat at that time?

A. At that time it was in the slip.

Q. Was that on the San Pedro side?

A. San Pedro, yes.

Q. Later that morning was the boat moved?

A. The boat moved to Fish Harbor.

Q. That is on Terminal Island? A. Yes, sir.

Q. Were you on the boat when it was moved?

A. Yes, sir.

Q. When you got to Fish Harbor, what did you do?

A. We went with the truck to the Crescent Warehouse. I went.

Q. Who told you to go? A. The captain.

Q. Did the captain go also?

A. No, the captain, he went with his machine.

Q. You went on the truck? [7]

A. On the truck.

Q. How many other men went?

A. Five or six. I don't remember; some crew of the boat.

Q. Did Mr. Muljat go?

A. I think he be there, yes.

Q. And Mr. Mratinich? A. Yes.

(Testimony of Steve Ruljanovich.)

Q. When you got to the warehouse, what did you do? Did you get off the truck, or what?

A. We went with the truck. When we came to the warehouse I came down from the truck.

Q. Did the rest of the men get off the truck too?

A. Yes; sure.

Q. Then what did you do?

A. I went in the warehouse, close to the net.

Q. As you would walk in the door of the warehouse, on what side was the net?

A. On the right side.

Q. How far inside the warehouse was the net?

A. Close to the door, like about three or four feet high. I don't know exactly. The net was on the platform.

Q. That platform was how high?

A. I don't know sure; about three or four feet, something like that; may be more.

Q. How big was this net? [8]

A. A tuna net, more than 200 fathoms; 300; something like that.

Q. More than 200 fathoms? A. Yes.

Q. When you went in the warehouse, what did you do? A. I sat in the wharf of cement.

Q. Do you mean on the platform?

A. No, behind the net; the wharf is cement.

Q. The wall of cement? Was there a little cement wall there? A. Yes.

Q. You sat on that? A. Yes.

(Testimony of Steve Ruljanovich.)

Q. Did the captain tell you where you were going to take the net?

A. He say come the truck inside the warehouse. Then we are ready to load the net.

Q. Did the captain tell you where you were going to take the net to? A. Right away.

Q. Did he tell you what you were going to do with the net? A. He told me put it in the truck.

Q. Where was the truck going to take it, if you know? A. From the French Sardine.

Q. What were you going to do with the net? [9]

A. Fishing.

Q. On what boat? A. "Betsy Ross."

Q. You were going to take that net to the "Betsy Ross"? A. Yes.

Q. After you sat down inside the warehouse wall there, were there any other of the crew near you?

A. Yes, a couple of fellows sat down close to me.

Q. Did you see Frank Muljat?

A. Yes, I seen him at that time.

Q. What did you see him do?

A. Some place; I don't know if he was sitting or not, but he been there.

Q. Did you see anyone get up to the net?

A. No, I don't see nobody.

Q. Where was the truck when you sat down on this cement wall?

A. The truck came inside; I don't know exactly; the truck in the warehouse came half of it inside.

Q. Did he drive in with the front of the truck or did he start to back in? A. Started to back in.

(Testimony of Steve Ruljanovich.)

Q. Then what, if anything, happened? What happened then?

A. Well, I just tried to get up to be prepared to load the nets and stand up like this; I don't see nothing. [10] Then something fell on my head and knocked me down.

Q. After you were knocked down, what is the next thing you remember?

A. I don't know exactly because I be just like a dead man. I don't know; my head running, bleeding; I don't know; exactly just like a dead man.

Q. Then were you taken to some doctor's office?

A. Yes.

Q. Do you know where that doctor's office was?

A. I don't know, only they take me afterwards, I hear they put me in the machine and they take me to Steller's office.

Q. Dr. Steller in Wilmington?

A. In Wilmington.

Q. Do you know how long you were at Dr. Steller's office?

A. Not before; I know at this time I went to Dr. Steller's office.

Q. How long did you stay there?

A. I been there, I don't know exactly; for an hour or something, because I don't know myself. I don't remember.

Q. Did they take X-rays at Dr. Steller's office?

A. I think they take X-rays, they tell me afterwards, yes.

Q. Was any blood coming from your head?

A. Sure. [11]

(Testimony of Steve Ruljanovich.)

Q. Whereabouts on your head was the blood coming from?

A. It bled all over. I don't know exactly.

Q. Did you afterwards find out you had a cut on your head?

A. Yes.

Q. Where was that cut?

A. Right in the center of my head.

Q. Was it on top of your head?

A. It was stitched right on top; seven stitches.

Q. They took seven stitches?

A. Yes.

Q. In the top of your head?

A. Right in the center of my head.

Q. Where were you when they took the stitches?

Was that in Dr. Steller's office?

A. Yes.

Q. From Dr. Steller's office, where did you go?

A. Well, I don't know myself. They took me in a machine.

Q. What kind of a machine?

A. Pete Cekalovich's machine.

Q. Now, from Dr. Steller's office where did you go?

A. To the hospital.

Q. What did they take you to the hospital in?

A. San Pedro Hospital.

Q. Did you go in Mr. Cekalovich's automobile? [12]

A. No; I don't know myself, because I don't remember at that time. Afterwards they told me the ambulance take me.

Q. You don't remember what kind of a machine you went in?

A. No, I don't know.

Q. They told you it was an ambulance?

A. They told me afterwards, the next time.

(Testimony of Steve Ruljanovich.)

Q. How long were you in the San Pedro Hospital?

A. For a week.

Q. What doctor or doctors took care of you in the San Pedro Hospital?

A. Dr. Petrich.

Q. Is Dr. Petrich connected with the United States Public Health Service?

A. Yes, sir.

Q. Do you know whether Dr. Petrich is in San Pedro now?

A. No, I don't think so. He moved some place.

Q. He was transferred?

A. Transferred, yes.

Q. In the hospital, how did you feel?

A. I feel—I don't feel very good, because, you know, afterwards my head—I feel kind of my head big.

Q. Aside from feeling big, did it bother you in any way?

A. No, I feel kind of heavy.

Q. Did you try to get up at any time in the hospital?

A. No; no, I couldn't. [13]

Q. Did your head ever ache in the hospital?

A. Sure.

Q. I want you to tell me just how you felt, how your head felt, or any other part of your body felt.

A. Just my head; I think my head was so big.

Q. Aside from just feeling big—

A. Sure.

Q. How did it feel?

A. I feel like headache.

Q. In the hospital, if you tried to move from one side of the bed to the other, did that change or affect the way you felt?

A. Pretty near everytime they moved me, nurses.

(Testimony of Steve Ruljanovich.)

Q. The nurses moved you? A. Yes.

Q. When that happened, would that make you feel any different with reference to your head?

A. Sure.

Q. What difference? How would you feel?

A. When I move I feel kind of heavy; not my body; my head seem heavy.

Q. Did they take any X-rays at the hospital?

A. Yes.

Q. After you left the hospital, where did you go?

A. I go home.

Q. Did you go to bed, or were you able to stay up? [14]

A. No; my friend, he take me with a machine, Steve Clarvich, because I couldn't walk. He take me in the machine, to the house where I live.

Q. When you got home did you go to bed or did you stay up? A. I went right away in bed.

Q. How long did you remain in bed continuously?

A. Five days I stay in bed.

Q. Five days after you got home? A. Yes.

Q. Then did you get up once in a while?

A. I got up once in a while; then I lay down. I try to walk.

Q. How did you feel when you got up?

A. When I got up I feel dizziness; started dizziness.

Q. Did you have any more headaches after you got home?

A. Yes, sure, always bother, my head dizzy.

(Testimony of Steve Ruljanovich.)

Q. When you got up you would feel dizzy?

A. Sure.

Q. After you would get up and feel dizzy, if you would lie down would the dizziness go away?

A. I don't feel dizzy when I lie down.

Q. How many days, or was it weeks, afterward did you go to bed, or stay in bed part of the day?

A. After I got up from that five days, then I lie down for an hour, then I get up again a little bit and try to [15] walk some.

Q. How long did that go on before you were able to stay up all day? A. Do you mean how long—

Q. I will withdraw that. You said you would be up for a while and then you would lie down for a while? A. Yes.

Q. How many days or weeks did that go on, that you had to lie down for a while during the day?

A. For a week. Then I went to see after Dr. Petrich.

Q. You saw Dr. Petrich after?

A. One week.

Q. How did you go to Dr. Petrich's office?

A. He take me, Mr. Cekalovich, with his machine.

Q. Dr. Petrich's office is up in the Federal Building in San Pedro? A. Yes.

Q. The United States Public Health Service, is that correct? Dr. Petrich's office is in the United States Public Health Service? A. Yes.

Q. Did you see Dr. Petrich again after this first time? A. I been a couple of times, yes.

(Testimony of Steve Ruljanovich.)

Q. Did you go to another doctor after that?

A. Yes, he told me to go to another doctor. [16]

Q. Dr. Petrich told you to go to another doctor?

A. Yes.

Q. What other doctor did you go to?

A. Dr. Dunbar.

Q. He is in San Pedro? A. Not now.

Q. At that time he was in San Pedro?

A. Yes, sure.

Q. He went into the armed forces, in the Army or Navy, did he? A. Navy.

Q. How long did you go to Dr. Dunbar?

A. I been five or six times; something like that.

Q. Was it right after that that Dr. Dunbar went in the Navy?

A. He told me to go down, if I wanted to see another doctor, Dr. Cassidy.

Q. Then you went to Dr. Cassidy? A. Yes.

Q. How long did you see Dr. Cassidy?

A. Six or seven times.

Q. When was the last time you saw Dr. Cassidy?

A. Something around August.

Q. August. Did you see another doctor after you saw Dr. Cassidy?

A. Yes; he sent me to a professor, right here in Los [17] Angeles Memorial Hospital. I have got his name. Cartfield.

Q. In the White Memorial Hospital?

A. Memorial Hospital, because I don't remember like before.

(Testimony of Steve Ruljanovich.)

Q. How did you feel during all this period of time? How did your head feel?

A. I feel better now, sure, but I couldn't work like before.

Q. During the period of time you were going to these doctors, Dr. Dunbar and Dr. Cassidy, how did your head feel?

A. I feel the same way when I be there; the same thing.

Q. What do you mean by "the same thing"?

A. The same dizziness.

Q. The same dizziness?

A. Dizziness. You mean when I been to see Dr. Cassidy?

Q. Yes, how did your head feel then?

A. I feel just the same, bad.

Q. What do you mean by "the same"? Did your head bother you?

A. I feel some days a little less, a little worse, but still dizziness at that time.

Q. Did you have any headache during that period of time? [18] A. Yes.

Q. Would they last very long or would they be of short duration?

A. Last me sometimes twenty minutes or half an hour.

Q. They would come and go?

A. Yes, come and go.

Q. After you saw Dr. Cassidy, what was the next doctor that you went to for treatment?

A. I told you Cartfield. The last one Walsworth.

(Testimony of Steve Ruljanovich.)

Q. When did you start going to him?

A. I started to him around September. I don't remember exactly; around September.

Q. How long did you continue to go to Dr. Walsworth?

A. I continued even I been before yesterday.

Q. You are still going? A. Sure.

Q. When you were under treatment of Dr. Walsworth, did you continue to get better?

A. I feel a little better. He gave me a couple of times some medicine.

Q. Has he kept you on medicine all during this period of time? A. Yes.

Q. To the present time? A. Sure.

Q. Do you have any headaches now? [19]

A. I tell you I feel better, but never like before. I don't remember everything like before.

Q. At the present time you are feeling a great deal better though?

A. I feel better, sure, but not like before, no.

Q. Do you have any headaches any more?

A. Headaches, it come sometimes because when I work I can't last very long. I have to leave the job every once in a while. It used to be I been working seven years at the cannery, and I never missed one day. Now I can't last very long.

Q. When did you start back to work, Mr. Ruljanovich? A. July 19.

Q. July 19 of this year? A. Of this year.

Q. Is there much noise in the cannery?

(Testimony of Steve Ruljanovich.)

A. Not much. Sometimes when they get more fish, running four or five machines, there is more noise.

Q. These machines you are referring to are machines that carry the cans and put the tops on the cans?

A. Yes. I work more light job than before.

Q. What do you do now?

A. I put the can in the cases. They call it tailing.

Q. Off from the conveyor belt?

A. Yes; they come on the machine and I take them and put them in the cases. [20]

Q. Does somebody else take the cases away or do you? A. Sure.

Q. Do you carry the cans away? A. No.

Q. At the time you had this injury, did you have a plate in your mouth of false teeth? A. Yes.

Q. Did you have both upper and lower plates?

A. Lower plate.

Q. Just the lower plate?

A. Both, but the lower plate was broken.

Q. When did you find that out, that the lower plate was broken?

A. Four teeth they take out. The next day, or the same day, he bring me home, I guess it was Mr. Zeka and Frank Muljat showed me the split on my teeth.

Q. After they took them out they showed them to you? A. Yes.

Q. Then you found out your teeth were split?

A. Yes.

Q. Do you remember how much you paid Dr. Dunbar or how much you paid to Dr. Dunbar?

A. Yes, I remember.

(Testimony of Steve Ruljanovich.)

Q. Do you have the receipts?

A. I got the receipt here.

Q. Do you have all of them? [21]

A. But I don't pay the medicine. That was all I received from my doctor.

Q. There are five or six here? A. Yes.

Q. From Dr. Dunbar? A. Yes.

Q. Are those all of the receipts from Dr. Dunbar?

A. Yes. Maybe I mistaken. I don't know. That is right, there was five.

Mr. Fall: Counsel, I believe you have seen these.

A. Excuse me, I spent some medicine he don't give me; that was \$5.00 and six, something like that.

Mr. Fall: If the court please, I notice the doctor from the United States Public Health Service is here with some records. He advised me he would appreciate it very much if we could put him on out of order, because he should get back to his duties. May we at this time call him out of order?

The Court: Call the doctor.

DR. EDDIE MONROE GORDON,

called as a witness on behalf of Libelant, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name?

The Witness: Eddie Monroe Gordon. [22]

Direct Examination

Q. By Mr. Fall: Dr. Gordon, you are the medical officer in charge of the United States Public Health Service, San Pedro branch?

A. No, Dr. Hedrick is in charge.

(Testimony of Dr. Eddie Monroe Gordon.)

Q. What is your position at the United States Public Health Service in San Pedro?

A. I am given supervision of the out patient office and contact facilities.

Q. Do you have with you the record of the United States Public Health Service for the treatment given Mr. Ruljanovich for the injury he sustained on May 4, 1942?

A. Yes, I do.

Mr. Fall: Mr. Kappler, do you want to approach the bench with reference to reading this into the record?

Mr. Kappler: I haven't seen that.

Mr. Fall: Neither have I.

A. These are records of the treatment he received both in the Hospital and at the out patient office. This is the hospital record.

Q. The hospital record indicates what his first treatment was, Doctor?

A. He was admitted to the hospital—

Mr. Kappler: May I examine the record first? I will stipulate that the entire record may go in, your Honor.

Mr. Fall: As I understand it, Doctor, these records [23] are to be returned to the United States Public Health Service, is that correct?

A. Yes. I have no authority to surrender the records.

Mr. Fall: Counsel, these can't go into evidence, only by reading into evidence. I am going to have him read certain portions of them, and if you want you can use what you want and keep adding as we go along, and probably save time.

(Testimony of Dr. Eddie Monroe Gordon.)

Mr. Kappler: So far as I am concerned, your Honor, I think probably the whole record should be read in evidence so that we can have the picture of what happened.

The Court: Proceed.

Mr. Fall: There is some of this I won't read. I will take from the first page, clinical record, the brief diagnosis indicates wound—the date is 5/4/42; wound, laceration of scalp. This is the hospital record, and 5/10/42 his condition was improved. Discharged.

Mr. Kappler: I think also, your Honor, that the authority of the United States Public Health Service to accept this man is indicated by the words "Authority: Master's certificate," and is signed by Dr. John Petrich.

Mr. Fall: The clinical record, history of the present disease: chief complaint, use patient's own words.

The Court: What is the date?

Mr. Fall: There appears no date on this page, your Honor. [24]

A. That was all taken at the same time of the physical examination. The date is indicated on that date.

Mr. Fall: He was struck on the head by a timber. Probable cause; date and mode of onset of disease; date and cause of injury; cause of admission; subjective symptoms; patient states that about 10 a. m. today, while working on some nets from a ship, which were stored in a warehouse in Wilmington, California, a large timber fell from overhead and struck him on the head. He was not unconscious. He states he was given emergency treatment at the Wilmington Emergency

(Testimony of Dr. Eddie Monroe Gordon.)

Hospital, where a laceration of the scalp was sutured. In a conversation with the doctor who treated him, the doctor stated that X-rays of the skull were taken, but failed to reveal any fractures. The patient is quite rational.

Mr. Kappler: And conscious. And this is signed by Dr. Petrich.

Mr. Fall: Clinical record: objective symptoms, 5/4/42, 12:30 p. m., temperature 98.4; pulse 88, regular; respiration 22; blood pressure 160/80. In general patient conscious and rational. Had large laceration about 4 inches long longitudinal in midline over vertex of scalp, already sutured with six dermal sutures. Three small rubber drains in place. Eyes: pupils equal, react to light and accommodation. Ears and nose: negative. Mouth and throat: false upper and lower dentures. Neck: negative. [25] Head: normal contours. Heart: regular tone and rhythm. Lungs: clear to percussion or oscillation. Abdomen: negative. G.U.: negative. Extremities: negative. Neurological: reflexes normal. No evidence of any serious intracranial injury. Impression: laceration of scalp: Under observation for skull fracture and intracranial injury. (Signed) Dr. John M. Petrich.

Clinical record: Ward surgeon, progress and treatment record: 5/4/42; 1:00 p. m. Patient admitted to hospital with a head injury received while unloading nets from a warehouse, with other members of crew from his ship, a large piece of timber struck him on top of head this morning. He states he was not unconscious. He received emergency treatment at the

(Testimony of Dr. Eddie Monroe Gordon.)

Wilmington Emergency Hospital, where a laceration of the scalp was sutured.

General: patient conscious and rational; does not appear seriously injured. Pulse 88, regular, good quality. Blood pressure 160/80. Head: change bandage over lacerated area. Neurological: reflexes normal. Impression: laceration of scalp. Under observation for skull fracture and intracranial injury.

Orders: 1. Bed rest. 2. Soft diet, 12 c.c. daily. 3. Take blood pressure and pulse at 3:00 p.m. 4. Nembutal, 1-1/2 grains at hours of sleep and as necessary. (Signed) Dr. Petrich.

Clinical record: 5/5/42. Ward surgeon's progress and [26] treatment record: Patient states he is feeling very well; has slight pain at site of injury, otherwise no complaints. No signs of intracranial injury. Pulse 88, regular. Blood pressure 130/90. Reflexes normal. Incision appears clean and to be healing well. No apparent drainage.

Orders: Restricted fluid intake to 12 c.c. daily.

The same clinical record, 5/6/42. Patient feels very well. Has no complaints except slight pain at site of laceration. Laceration healing well. Drains removed. No evidence of intracranial injury. Pulse 80, regular, good quality. Blood pressure 124/90. Reflexes, normal. Complete blood count taken on admittance showed only 2,800,000 and 70 per cent hemoglobin.

Orders: Hemo cromin, 2 tablets three times a day.

Same clinical record, 5/7/42. Laceration healing well. Looks clean. Redressed.

(Testimony of Dr. Eddie Monroe Gordon.)

Same clinical record, dated 5/8/42. Laceration healing well. Sutures removed. Patient feeling very well. Has no complaints.

Orders: X-ray of skull.

Same clinical record, 5/9/42. X-ray was negative for fracture. Patient feels very well; has no complaints.

Orders: May be up today and discharged today if can make arrangements.

General diet, fluids ad lib. [27]

The doctor says that means as much as he wanted.

5/10/42. Same record: feeling well, no complaints. Ordered discharged.

At the end of each one of these days the record is initialed "J.P." That is Dr. Petrich? A. Yes.

Mr. Fall: Same record, date 5/11/42. Summary: This patient was admitted to the San Pedro Hospital on 5/4/42 with a large laceration of the scalp received as the result of a blow on the head by a falling piece of timber. The same morning of admittance he was given emergency treatment at the Wilmington Emergency Hospital, where the laceration was sutured. When admitted he was quite conscious and rational, and stated he was not unconscious at any time after the injury. X-rays of the skull were today, 5/8/42, and failed to reveal any fractures.

The Witness: I think what it means, they were taken on 5/8; that means in our hospital. That was just a slip.

(Testimony of Dr. Eddie Monroe Gordon.)

Q. Instead of the word "today" it should read "taken"; the last sentence should be "X-rays of the skull were taken on 5/8/42, and failed to reveal any fractures."

Repeated examinations in hospital failed to reveal any signs of intracranial injury.

Diagnosis: 1. Laceration of scalp: Laceration healed well and he was discharged on 5/10/42. Condition [28] improved. Signed J. Petrich.

Mr. Kappler: On Tuesday, May 5, appears the notation at seven o'clock: appetite good. On the same date at 2 a.m. appears the notation: awake often. No special pain. On the following day, May 6, at 7 o'clock, appears another notation: appetite good. And preceding that appears the notation: a good night.

Mr. Fall: That was earlier. It appears he was given nembutal.

Q. That was the evening before? A. Yes.

Mr. Fall: At 9 o'clock.

Mr. Kappler: The same notation appears on the 7th at 6 a.m.: a good night. At 7 o'clock appears the notation: appetite good. On the same day, later on in the day, apparently 11:30, appears another notation: appetite good.

Mr. Fall: That night he was given—and that night was the evening of the 7th, he was again given nembutal.

Mr. Kappler: On Friday, the 8th, appears the notation at 6 a.m.: slept well. At 7 o'clock: appetite good. At 11:30 appears another notation: appetite good. At 4:30 on the same day another notation: appetite good.

(Testimony of Dr. Eddie Monroe Gordon.)

Mr. Fall: That evening, May 8th, at 9 o'clock: again given nembutal.

Mr. Kappler: What is the dosage there, Doctor?
[29]

A. The order is 2 grains. That is capsules of 1-1/2 grains.

Mr. Kappler: On May 9th, notation at 6 o'clock: slept well. At 7 o'clock: appetite good. 11:30, another notation: appetite good. And at 1 p.m.: Up and about. At 6:00 p.m. on the same date, that is, May 9th, appears a notation: P.M. care, alcohol and powder. Made comfortable. Good day.

Mr. Fall: That same day at 9:00 p.m. he was again given nembutal.

Mr. Kappler: The following day, May 10th, at 6 a.m. appears the notation: Had a good night. At 11:30 on May 10 appears the notation: Patient dismissed from hospital, walking.

There appears in the file, your Honor, a document entitled "Master's Certificate of Service of Sick or Injured Seaman," signed by Frank Muljat, and authorizes the United States Public Health Service to render medical care and attention to this man.

There is another one on the same date signed by Peter Cekalovich, master of the vessel.

The Court: What date?

Mr. Kappler: The same date, apparently, and signed by Muljat, the other is signed by Cekalovich, one of the owners and master of the vessel.

The Court: What is the date? [30]

(Testimony of Dr. Eddie Monroe Gordon.)

Mr. Kappler: May 4. I think undoubtedly the law requires that it be signed by the master.

Mr. Fall: I would like to read into the record the clinical record, radiograph report from Ward No. 23, May 8, 1942, A.P. and stereo lateral of skull, information requested. Bone pathology; clinical impression, fracture in vertex of skull. Signed by J. Petrich, Assistant Surgeon.

X-ray findings. No definite evidence of skull fracture.

(Short recess.)

Mr. Fall: I would like to read into evidence a card, known as what, Doctor? A. Form 1971-E.

Mr. Fall: Form 1971-E. What is this card?

A. An out patient card.

Q. With reference to Steve Ruljanovich. History: This patient was released from San Pedro Hospital on 5/10/42, where he was treated for a large laceration of the skull since 5/4/42. Had received a heavy blow on the head. However, he showed no signs of intracranial injury. Reported for check-up. He states he has some soreness of neck muscles.

Notation: Laceration healed well. No evidence of complication. Signed by J. Petrich, Assistant Surgeon.

Record of treatment, 5/13/42: Chloroform liniment to neck muscles. 5/19/42, Dr. Smith saw this patient and [31] ruled he was not eligible for treatment. However he was to be given insurance form for time he was treated in hospital; certificate to out patient and hospital treatment given. Copies for the hospital folder. Signed Sherman.

(Testimony of Dr. Eddie Monroe Gordon.)

Q. Sherman was a doctor?

A. No, he was just a clerk.

Mr. Fall: Is there anything else you want?

Mr. Kappler: Yes. Your Honor, the only other thing is the clinical record: An examination of the blood revealed 2,800,000 red corpuscles, 10,700,000 white corpuscles with hemoglobin per centage of 70 per cent.

There appears to be a temperature chart in the file. Can you interpret that temperature chart for us from the time the man entered until the time he left?

A. At 2:00 a.m. his temperature was normal, but from 2:00 p.m. on the day of admittance until 6:00 p.m. on May 7 he ran an intermittent type of fever with the temperature never below 100 degrees Fahrenheit. From May 7 until discharge his temperature was normal.

Q. When you say never above 100, what is normal temperature? A. 98.6.

Mr. Kappler: That is all that I have.

Mr. Fall: I have no further questions from the doctor.

Mr. Kappler: I want to ask one question: (Q.) Was Dunbar connected with the United States Public Health Service [32] at all? A. No, sir.

Q. Dr. Cassidy? A. No, sir.

Mr. Kappler: That is all.

Mr. Fall: I do have one other question:

Q. Doctor, is Mr. Ruljanovich eligible for treatment in the United States Public Health Service?

A. At the present time?

Q. At that time was he eligible?

(Testimony of Dr. Eddie Monroe Gordon.)

Mr. Kappler: I object to that on the ground it calls for the conclusion and opinion of the witness upon a legal matter which is governed by the statutes of the United States, and I don't presume he would know. I think it would be a matter for your Honor's interpretation. The fact remains they did give this man aid down there.

The Court: What is the materiality of it?

Mr. Fall: It is going to be very material, your Honor, because after he was ruled ineligible and incurred expense for treatment over a considerable period of time, if he is eligible for treatment at the United States Public Health Service, and during that period of time he obtained treatment outside and failed to take advantage of it, then he is not entitled to recover for his expenses incurred for that treatment.

Mr. Kappler: The only objection I have, your Honor, [33] as to whether or not a fisherman would be entitled to the advantages of the United States Public Health Service would be a matter for the court to determine from a construction of the United States Statutes. Although the doctor may know what their practice is down there, the fact remains as to whether the man had a right to get that treatment, and is entirely something which would call for his conclusion.

The Court: I think that objection is good, counsel. If you develop all the facts connected with this man's employment, the court can determine that.

(Discussion.)

The Witness: A man still has a right to choose his own physician, even if he is entitled to treatment, he still has the right to go anywhere and pay for it. I don't see where that would enter—

(Testimony of Dr. Eddie Monroe Gordon.)

Mr. Kappler: I move that be stricken as a voluntary statement and calling for this man's conclusion with reference to what the rights of a seaman are under the general maritime law.

The Court: I will let it stand in the record. It is just a method of procedure.

Q. By Mr. Fall: Mr. Ruljanovich was not given any treatment after the 19th day of May, 1942?

A. There is no record of his having received any treatment from the Public Health Service. [34]

Q. That is, from the United States Public Health Service? A. Yes.

STEVE RULJANOVICH,

recalled.

Direct Examination

resumed

By Mr. Fall:

Q. Mr. Ruljanovich, these five receipts you have handed me are from Dr. Dunbar and are receipts for the money you paid him for treatment?

A. Yes, sir.

Q. And did you pay him on the same day that you were given treatment?

A. Cassidy I paid the same day, every time.

Q. The first one is June 23, \$5.00? A. Yes.

Q. The next one is July 9, \$2.00? A. Yes.

Q. The next one is July 23, \$2.00; August 11, \$2.00; and August 25, \$2.00. A. Yes.

Q. That was all you paid Dr. Dunbar?

A. Some medicine, I got no receipt of the medicine, \$5.50, something like that.

(Testimony of Steve Ruljanovich.)

Q. But the money that you paid to Dr. Dunbar is indicated by these receipts? [35] A. Yes, sir.

Q. They total \$13.00? A. \$13.00.

Mr. Fall: We offer in evidence these five receipts. They can be marked as one exhibit.

The Clerk: Libellant's Exhibit 1.

LIBELLANTS' EXHIBIT NO. 1.

W. Vernon Dunbar, M. D.
471 West Seventh Street
San Pedro, Calif.
Phone 282

No. 8712
June 23, 1942

Received of Mr. Steve Ruljanovich
Five and no/100.....Dollars
Bal. Brought Fwd
Amount Paid 5 — By Eleanor Hay
Balance Due

W. Vernon Dunbar, M. D.
471 West Seventh Street
San Pedro, Calif.
Phone 282

No. 8966
July 9 1942

Received of Mr. Steve Ruljanovich
Two and no/100.....Dollars
Bal. Brought Fwd.
Amount Paid 2 — By Eleanor Hay
Balance Due

(Libellants' Exhibit No. 1.)

W. Vernon Dunbar, M. D.

471 West Seventh Street

San Pedro, Calif.

Phone 282

No. 9195

July 23 1942

Received of Mr. Steve Ruljanovich

Two and no/100.....Dollars

Bal. Brought Fwd.

Amount Paid 2 —

By Eleanor Hay

Balance Due

W. Vernon Dunbar, M. D.

471 West Seventh Street

San Pedro, Calif.

Phone 282

No. 9473

August 11 1942

Received of Mr. Steve Ruljanovich

Two and no/100.....Dollars

Bal. Brought Fwd.

Amount Paid 2 —

By Eleanor Hay

Balance Due

W. Vernon Dunbar, M. D.

471 West Seventh Street

San Pedro, Calif.

Phone 282

No. 9718

August 25 1942

Received of Mr. Steve Ruljanovich

Two and no/100.....Dollars

Bal. Brought Fwd.

Amount Paid 2 —

By Eleanor Hay

Balance Due

[Stamped]: Date: 12/16/43. No. 1 in evidence.

(Testimony of Steve Ruljanovich.)

Q. By Mr. Fall: You have handed me four receipts from Dr. Cassidy. Were these sums paid to Dr. Cassidy on the same day that you went there for treatment? A. On the same day.

Q. The first one is September 16, 1942, \$2.00; November 19, \$2.00; December 4, \$1.50; January 23, 1943, \$2.00. A. Yes.

Q. A total of \$7.50 to Dr. Cassidy? A. Yes.

Mr. Fall: We offer these receipts in evidence.

The Clerk: Libellant's Exhibit 2.

LIBELLANTS' EXHIBIT NO. 2.

Save Your Receipts

E. S. Cassady, M. D.

804 So. Pacific Ave.

San Pedro, Calif.

Sept. 16 1942

Received of Mr. Steve Ruljanovich

Two and no/100.....Dollars \$2 no/100

E. S. Cassady, M. D.

Balance Due \$ In full By H

Save Your Receipts

E. S. Cassady, M. D.

804 So. Pacific Ave.

San Pedro, Calif.

Nov 19 1942

Received of Rujnovich Mr. Steve

Two.....no/100 Dollars \$2 00/100

E. S. Cassady, M. D.

Office

Balance Due \$.....

By Hazel Robertson

(Libellants' Exhibit No. 2.)

Save Your Receipts

E. S. Cassady, M. D.

804 So. Pacific Ave.

San Pedro, Calif.

Dec. 4 1942

Received of Mr. Steve Ruljanovich

One and 50/100.....Dollars \$1 50/100

E. S. Cassady, M. D.

Balance Due \$ In full

By H

Save Your Receipts

E. S. Cassady, M. D.

804 So. Pacific Ave.

San Pedro, Calif.

Jan. 23 1943

Received of Mr. Ruljanovich

Two and no/100.....Dollars \$2 no/100

E. S. Cassady, M. D.

Balance Due \$ In full

By H

[Stamped]: Date: 11/26/43. No. 2 in evidence.

Mr. Kappler: I object to the admission, your Honor, of both Libellant's Exhibits 1 and 2, upon the ground that they are immaterial, there being no showing so far that any of the treatment which the libellant received from any of these doctors was not treatment which could not have been obtained at the United States Public Health Service.

Mr. Fall: The record is in without objection that he was ruled ineligible for treatment at the United States [36] Public Health Service. He was told to go elsewhere for treatment.

(Testimony of Steve Ruljanovich.)

The Court: In evidence.

Mr. Kappler: May we have an exception to that, your Honor?

The Court: Yes.

Q. By Mr. Fall: You have handed me four receipts from Dr. C. B. Walsworth. Were those amounts paid to Dr. Walsworth for treatment for your condition resulting from your injuries? A. Sure.

Q. You have handed me four receipts from Dr. Walsworth. Do those receipts indicate the total sums you paid to Dr. Walsworth? A. Yes.

Q. The first one is March 5, 1943, for \$6.50; April 20, 1943, \$5.00; July 12, 1943, \$5.00; November 5, 1943, \$11.50.

A. Excuse me. I couldn't find that receipt when I paid Dr. Cassidy the Memorial Hospital. I paid cash \$25.00. I couldn't find it, because I looked this morning and I couldn't find it.

Q. But these receipts from Dr. Walsworth totaling \$28.00 are all that you paid to Dr. Walsworth?

A. Yes, sir.

Mr. Fall: We offer these receipts of Dr. Walsworth as [37] libelant's next in order.

Mr. Kappler: I object on the same grounds.

The Court: In evidence.

The Clerk: Libelant's Exhibit 3 in evidence.

(Testimony of Steve Ruljanovich.)

LIBELLANTS' EXHIBIT NO. 3.

Mar. 5 1943 No. 508

Received of Mr S Ruljanovich

Six & 50/100.....Dollars

\$6.50

Dr C B Walsworth

cash

April 20 1943 No. 890

Received of Mr. S. Ruljanovich

FiveDollars

\$5.00

Dr. C. B. Walsworth

cash

July 12 194.... No.

Received of Steve Rujanovich

Five and no/100.....Dollars

\$5.00

Dr. C. B. Walsworth

Nov. 5 1943 No.....

Received of Steve Rujanovich

Eleven & 50/100.....Dollars

in full to date

\$11.50

Dr. C. B. Walsworth

[Stamped]: Date: 12/16/42. No. 3 in evidence.

Q. By Mr. Fall: You were examined by Dr. Courville in the White Memorial Hospital? A. Yes.

Q. Who sent you to Dr. Courville?

A. Dr. Cassidy.

Q. That was when you were under treatment with Dr. Cassidy? A. Yes, sir.

Q. What did that examination cost?

A. \$25.00.

(Testimony of Steve Ruljanovich.)

Q. And Dr. Courville is a neurologist?

A. Yes, sir.

Q. Do you know whether or not he is in the armed services now, in either the Army or Navy?

A. I don't know, Mr. Fall, because at that time he said to me maybe he go in the Army.

Q. Have you tried to contact him? A. Yes.

Q. In the last few months? A. Yes.

Q. Were you able to get in touch with him?

A. No. I be once over there. [38]

Q. Was he there then? A. I don't think so.

Q. You went to his office?

A. Yes, I been in the office; yes.

Q. And he wasn't there?

A. I don't think so. He says he go in the Army. I don't know now.

Q. Do you know how much money you spent for medicines?

A. Well, I spent for Walsworth about \$11.50 and for Dunbar \$5.60, something like that, and Cassidy \$4.30.

Q. You were examined by Dr. Dickerson, were you?

A. Yes, sir.

Q. Who sent you to Dr. Dickerson?

A. Lawyer Roberts from Wilmington.

Mr. Fall: You may cross examine.

(Adjournment was had until two o'clock p. m. of the same day.)

(Testimony of Murray H. Roberts.)

At 2:00 o'clock p. m.

Mr. Kappler: Before I start with cross examination of the libelant, your Honor, there is an attorney in the courtroom, Mr. Roberts, who is under subpoena, who is doing certain work at the harbor in the way of war shipping, and he informs me he would like to get out of here as soon as he can. I wonder if he can be called out of order.

The Court: He may be called out of order. Anything to [39] expedite the war.

MURRAY H. ROBERTS,

called as a witness on behalf of the Libelant, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Murray H. Roberts.

Direct Examination

By Mr. Fall:

Q. Mr. Roberts, did you have occasion to employ Dr. Dickerson for the purpose of making some examination of Mr. Ruljanovich? A. I did.

Q. And those examinations were made when, do you recall? A. No, sir, I don't.

Q. Do you recall it was sometime—the examination was sometime in 1942?

The Court: Is this a doctor?

The Witness: No; I am an attorney.

The Court: I understood you were, but I thought, in making a physical examination, I was listening to a doctor.

(Testimony of Murray H. Roberts.)

Mr. Fall: No; he employed Dr. Dickerson for the purpose of making an examination of Mr. Ruljanovich.

The Court: All right, just so we don't get the doctors and lawyers mixed up.

Q. By Mr. Fall: You say Approximately August 1, 1942, [40] would be near the date of the first examination? A. I think so.

Q. Then sometime early in January, 1943, another examination was made? A. I think so.

Q. You received the reports, did you not?

Mr. Kappler: That is objected to as being utterly immaterial.

Mr. Fall: I am laying the foundation. I have got to call a doctor that is a hostile witness. He was employed by the insurance carriers, and is the only neurologist that saw the man at that particular period of time, and he would be the only one that could testify as to the man's condition as of August 1, 1942, and I anticipate he is going to be quite hostile, from some things that occurred, and I desire to lay the foundation because I may ask to examine him by leading questions, by reason of the fact that he is a hostile witness.

The Court: I don't see how you can accomplish that by this witness.

Mr. Fall: I want to lay the foundation to show by whom he was employed, and by whom his services or bill for his examination was paid.

Mr. Kappler: I object to that as immaterial.

The Court: I will overrule the objection, if that is counsel's only purpose. [41]

(Testimony of Murray H. Roberts.)

A. I drew a draft in payment of Dr. Dickerson's bill.

Q. By Mr. Fall: You drew a draft from what company? A. Not on any company.

Q. On what account?

A. I don't know what you mean by that.

Q. What did you pay him for?

A. I paid him for his services rendered.

Q. Out of what account did that money come?

A. I don't know. I drew a draft on an individual in payment of the bill.

Q. Do you have that draft?

A. I don't have have the original. The original was presented for payment in San Francisco.

Q. And that draft was drawn on the Occidental Indemnity Company or the Fireman's Fund Insurance Company? A. No, sir.

Q. It was drawn on John Black?

A. That is right.

Q. John Black is agent for the Occidental Indemnity Company, and the Fireman's Fund?

Mr. Kappler: I object to that as being immaterial.

The Court: You may answer.

A. He isn't an agent, no. He is our chief counsel.

Q. By Mr. Fall: He is chief counsel for the company, is that right?

A. That is right. That is, with reference to certain [42] types of coverage.

Q. And the particular type of coverage that was on the "Betsy Ross"?

(Testimony of Murray H. Roberts.)

Mr. Kappler: I object to that as being wholly immaterial.

The Court: There is no foundation for that, is there, counsel?

Mr. Fall: Maybe not.

The Court: Objection sustained.

Q. By Mr. Fall: You are employed by John Black, is that correct?

A. I am retained by him. I wouldn't use the word "employment" as describing my association.

Q. You have offices with John Black; his name is on your office in Wilmington?

A. His name appears on the door, with another name.

Q. Do you have the receipted bills sent by Dr. Dickerson?

A. No, sir, I do not.

Q. Did you ever receive one?

A. Did I? I received two of them.

Q. Where are they? A. In San Francisco.

Mr. Fall: That is all.

Mr. Kappler: No questions. [43]

STEVE RULJANOVICH,
recalled.

Cross Examination

By Mr. Kappler:

Q. You recall, Mr. Ruljanovich, that you filed with the Industrial Accident Commission application to get compensation from your employer?

A. Compensation? I don't get nothing.

(Testimony of Steve Ruljanovich.)

Mr. Fall: May I offer something at this time? In view of the fact that the court has admitted a portion of the record which Mr. Kappler has taken this document from, I believe the whole record should be before the court, as long as the whole thing is certified; I think it would be a very good idea that the whole thing go in.

The Court: I think if there is any other part of the record that in any way explains the document that is offered in evidence, or is necessary to a proper interpretation of the document that is offered in evidence, then that document should be in evidence.

Q. By Mr. Kappler: Do you recall that on or about January 19, 1943, you signed the document that appears to be in this form?

Mr. Fall: We will stipulate that he did.

Q. By Mr. Kappler: Your examination by Dr. Courville, the neurologist, at the White Memorial Hospital, was made on or about January 31, wasn't it?

A. Yes. [44]

Q. In other words, it was after you had filed this application for the adjustment of your compensation, isn't that right. A. Yes.

Q. As a matter of fact, Mr. Ruljanovich, that Dr. Courville did not give you any medical treatment of any kind?

A. No; just an examination in the office.

Q. He just examined you? A. Yes.

Q. Isn't it a fact that the \$25.00 which you paid him was for the purpose of his making out a report which could be submitted to the Industrial Accident Commission as evidence?

(Testimony of Steve Ruljanovich.)

The Court: I think you will have to break up your sentences and make them shorter and in plainer language, because this witness does not understand large words. I think counsel could stipulate as to that.

Mr. Fall: There must have been two examinations. I know that the report of Dr. Courville was up before the Industrial Accident Commission, but I don't know whether that was obtained for that purpose. My recollection is that it was sent to one of the doctors in San Pedro and was obtained for that purpose, and was subsequently used, but I am not sure.

Mr. Kappler: In any event, the examination was made [45] after the application was filed. That is the point I wanted to bring out.

Mr. Fall: Find out if another examination was made by Dr. Courville.

Q. By Mr. Kappler: Did he examine you more than once? A. No, just once.

Q. You have itemized for his Honor a list of the doctor bills, then you made a separate list of the medicines which you purchased. You stated to the court that there was an item of \$11.50 for which you had received a receipt from Dr. Walsworth. Do you recall that? A. Yes.

Q. Then when you came back and gave your testimony about medicine, you listed \$11.50 for medicines incurred from Dr. Walsworth. A. Yes.

Q. Isn't it true that that is the same figure you are talking about?

A. Yes, but I don't show \$11.50. I have got no receipt with me, but I know exactly.

(Testimony of Steve Ruljanovich.)

Q. Did you pay Dr. Walsworth \$11.50?

A. I did.

Q. You also then incurred another expense of \$11.50?

A. No, excuse me. That is besides, I buy in the drug store, besides the visits.

Q. How do you arrive at a figure of \$11.50? Did you [46] keep a record of your purchases of drugs?

A. Sure.

Q. Where have you got that record?

A. I got it home.

Q. Can you bring it to court with you tomorrow?

A. Sure.

Mr. Kappler: I would like to offer in evidence, your Honor, the original deposition of the libelant, which was taken in Mr. Fall's office on October 23, 1943.

Mr. Fall: To which I object. The witness is in court.

The Court: Yes; I think the rule is, counsel, if the witness is here and he can be fully and thoroughly examined, the objection of Mr. Fall is good, but if you want to use it for any purpose—

Mr. Kappler: I was really only endeavoring to save time, your Honor.

The Court: I appreciate that, but the objection will have to be sustained.

Mr. Fall: Your Honor, if it is going to save time, I have no objection to its going in, but I think it should be read and not introduced at this time during the cross examination.

(Testimony of Steve Ruljanovich.)

The Court: Your objection is good, counsel. I will have to sustain it on the ground stated by counsel.

Mr. Fall: Counsel, if you want to save time, I will stipulate it may go in. [47]

Mr. Kappler: All right, then, I can read it at a later time, your honor.

The Court: Yes.

Q. By Mr. Kappler: Mr. Ruljanovich, let me ask you this: You recall the taking of your deposition in Mr. Fall's office? A. Yes.

Q. Who was present when you made changes in the deposition? A. What is that?

The Court: Show him what you mean, counsel. He is not familiar with legal proceedings.

Q. By Mr. Kappler: Do you recall the day that I was in Mr. Fall's office and asked you a lot of questions? A. Yes.

Q. There was a lady there who took down the examination in shorthand? A. Yes.

Q. Thereafter she wrote it up? A. Yes, sir.

Q. This document was shown to you, wasn't it, after that? A. Yes.

Q. Where was that? In Mr. Fall's office?

A. Mr. Fall's.

Q. Who was present besides yourself and Mr. Fall? [48]

A. You and Mr. Fall and my daughter.

Q. After it was written up, Mr. Ruljanovich?

A. After you and Mr. Fall.

(Testimony of Steve Ruljanovich.)

Q. That was when I asked you the questions.

A. Sure.

Q. After this was all typed up, which was after I left the office, you saw this document, didn't you?

A. Yes.

Q. Who was there at that time when you made these corrections in the document?

A. Because I made a mistake. You see, I made a lot of mistakes. I know that; you know I can't speak, and I made mistakes. That is why I need an interpreter.

Q. I want to know who was there when you corrected the deposition.

A. I was. I been in Mr. Fall's office.

Q. Was there anyone else there besides Mr. Fall and yourself?

A. It was with my daughter.

Q. That is Mrs. Cekalovich?

A. Mrs. Cekalovich.

Q. Were all these corrections made in your own handwriting?

A. No.

Q. Who made them?

A. I guess my daughter. [49]

Q. Your daughter made the corrections

A. Yes.

Q. Is that your handwriting where it says "S. R."?

A. Yes, this is mine.

Q. Each place where it says "S. R." is yours?

A. Sure.

Q. Did anybody suggest to you that certain changes should be made in the deposition?

A. No.

(Testimony of Steve Ruljanovich.)

Q. Did you talk it over with Mr. Fall and your daughter before you made the changes?

A. No, because I no understand, because I don't understand every words.

Q. So you made the changes because you did not understand at the time the question was asked?

A. Yes, I told you I don't remember everything like before.

Q. You say you are taling cans right now at the French Sardine Company? A. Yes.

Q. How many hours a day do you work down there at the present time?

A. Sometimes six or seven; it depends upon how the fish—

Q. It depends on how the fish run? A. Yes.
[50]

Q. On occasions since you went back to work in July you have worked overtime, haven't you?

A. I was a couple of times overtime, because he tell me he be short of men. I try a couple of times, he make me work, and I stayed home after that six or seven days. Of course I get tired; I can't last very long.

Q. Aside from that, though, you have been employed continuously since July; is that right?

A. Yes.

Q. As I understood from your deposition, you are making more money now than you were when you were working for the French Sardine Company, before you were employed on the "Betsy Ross"?

(Testimony of Steve Ruljanovich.)

The Court: That is too complicated. I don't understand it myself. I don't know how you would expect a man like this to understand it, counsel.

Mr. Fall: Counsel, I will stipulate that the rate of pay in 1941 and the early part of '42 for the men in the cannery was 80 cents an hour, and sometime between May, 1942, and July of 1943 they increased the pay to 90 cents an hour.

Mr. Kappler: I will accept the stipulation. That is all, your honor.

Mr. Fall: I think it is in the deposition anyway.

The Court: Any further questions?

Mr. Fall: No, I have none, your Honor. [51]

DR. DORRELL G. DICKERSON,

called as a witness on behalf of the Libelant, being first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Dorrell G. Dickerson.

Direct Examination

Br. Mr. Fall:

Q. Dr. Dickerson, you made an examination of Steve Ruljanovich at the request of Murray Roberts, or rather two examinations?

A. Two examinations, sir.

Q. One of them on August 1, 1942, and one January 9, 1943?

A. That is right.

Q. Doctor, of what school of medicine are you a graduate?

(Testimony of Dr. Dorrell G. Dickerson.)

A. George Washington University, Washington, D. C., 1917.

Q. You are specializing in neurology?

A. Neurology and brain surgery.

Mr. Fall: Will you stipulate to Dr. Dickerson's qualifications?

Mr. Kappler: Yes.

Q. By Mr. Fall: On January 9, 1943, you made a written report to Mr. Roberts, did you?

A. Yes, that is the second one. I made the first one on August 1, 1942. That is the last one, January 9, [52] 1943.

Q. I show you—

A. I have them here.

Q. —a copy that I have here, signed by you. Will you take a look at that and see if that is the report you made on January 9, 1943?

A. Yes, that is right.

Mr. Fall: We offer this in evidence.

Mr. Kappler: I object to it on the ground it is immaterial and is not the best evidence. The doctor is here in court and he can testify to what he found.

The Court: Objection sustained. You can ask the doctor any questions you desire, counsel, from the report.

Q. By Mr. Fall: Doctor, you made an examination of him first on 8/1/42. What, if any, were the complaints at that time?

A. To use his words, which I took down here, "I get dizzy spells and headaches. This bone in my neck

(Testimony of Dr. Dorrell G. Dickerson.)

is sore." He indicates the lower cervical spine. And "I sleep lightly." Those were his complaints.

Q. And on your examination what were your findings?

A. I will read them here. I examined Mr. Ruljanovich in my office and there was a friend present. I don't know the gentleman's name. He was a short, well developed, stocky man; weighed about 160 pounds. His head was normal except for a scar which was irregular in shape at the top of the skull, at vertex. There was no depression or [53] any elevation of the skull. The scar was about $\frac{3}{4}$ of an inch away from the mid line, slightly back of the vertex, about $2\frac{1}{2}$ by 3 inches, irregular. The healing had been good and normal. The ears negative. Tonsils either had been removed or extremely small. I could hardly see them. Mouth in fair condition; teeth partly out. He was wearing dentures, which he said had been broken in the accident.

The neck was normal. No grating of the bones or crepitus. He was complaining of soreness around the seventh cervical spine. That is the lower cervical. But he was able to do all the usual tests of the neck.

The thyroid you couldn't feel. The glands of the neck were not enlarged; could not be felt.

The heart sounds were moderately accentuated; a little sharper than the ordinary condition.

The blood pressure was 160/85.

The arteries of the arms, I could feel them rotate under my fingers.

(Testimony of Dr. Dorrell G. Dickerson.)

Pulse rate normal. The volume was good.

The extremities were normal.

I examined the sense of smell; it was normal, both sides.

He had a disturbance of vision, what is called myopic state; about half normal; 20 over 40. The optic nerve was normal; what we call fundi, negative. No nystagmus. Ocular movements normal. No double vision. Twitching of [54] the eye in face was the same on either side. The face was symmetrical. Bite equal. Face nerves normal. No disturbance of sensation. Tongue, when asked to stick it out, came out near the midline. Hearing was normal.

Wever was referred. Had good strong shoulder muscles; equal. All deep reflexes were present, arms and legs, about one plus in arms and shoulders. Superficial reflexes present and normal. No pathological reflexes.

Sensory tests all normal.

Motor tests: no weakness or atrophy. Coordination normal. Testing the cerebellum, it was normal. No disturbance of speech. Cerebral lobes normal, parietal normal; occipital lobes of the brain normal. Visual fields in normal condition. The Romberg test was good; sways in the Romberg posture. When I had him put his feet together and close his eyes, he wobbled a little bit from side to side. He walked normally and naturally.

That was the extent of my examination.

Q. On that report what were your conclusions?

(Testimony of Dr. Dorrell G. Dickerson.)

A. This man cooperates splendidly. Does not make any effort to exaggerate his test. There are no signs of organic brain injury. He has moderate high blood pressure, which results in vertigo; that may last several months, and especially for a person past middle life.

Another symptom he complains of, he states that there is tenderness of the seventh cervical spine, which will [55] resolve in time, possibly four or five months.

I suggested rest and the avoidance of direct sun rays; heat, massage, and I felt there would be a recovery from all of the symptoms. I advised treatment for the hypertension and dizziness, and diagnosed that he was temporarily totally disabled.

Q. That condition was essentially the same when you examined him on January 9, 1943, was it, Doctor?

A. I did not hear the first part of the question.

Q. Was that condition essentially the same when you examined him on January 4, 1943?

A. I will have to read this again to be sure about that. I haven't read it, and it is a matter of some little time.

Q. Do you have a copy of your report that you made on January 4, 1943?

A. Yes, I have it here.

Q. You might go ahead and read your conclusions.

A. I might state this interval history. He has not been working since he was here last, August 1, 1942. He says he has done no work, no home chores; that he has seen Dr. Cassidy about once a month at San Pedro. He said the progress remains about the same.

(Testimony of Dr. Dorrell G. Dickerson.)

I asked him how he felt and his complaints. He complained of dizziness and said the spine behind—can't touch it at times, because it is sore. When I walk I get a grab [56] in my head. I don't feel like working because of the dizzy head and the sore spine. I don't sleep very good because the grabbing in my head makes me nervous, and I have to get up in the night. My appetite is not so bad—medium. I weigh about 163 pounds.

The examination of his general physical condition showed him about the same; a stocky, swarthy man, five feet five inches, 165 pounds. Head normal in shape and size. Scar; the healing had been good and normal.

Ears negative.

Tonsils out.

Mouth clean. Partial denture. Lower central incisors need attention. Some gingival irritation present. Tender on seventh cervical spine. No spasm or limitation in motion. No crepitus, which would be grating of the bones.

Thyroid could not be felt. Post cervical lymph nodes not enlarged.

Heart tones moderately accentuated. No murmurs.

Blood pressure lower, 150/80. Pulse normal rate and quality.

Peripheral vessels palpable.

Abdomen: No complaints.

Extremities are normal.

On the neurological there was no change whatever. That was the same.

(Testimony of Dr. Dorrell G. Dickerson.)

On the Romberg test, sways in the Romberg position, [57] knees and feet together and eyes closed he swayed.

What does that indicate?

A. That in itself does not indicate anything in particular. You see it in a lot of people. Romberg taken with other things has a lot of significance, but by itself it has no particular significance. You would probably sway in the same test under nervous tension on examination. If one would fall over or pitch violently and quickly, it would have great significance and might mean something rather serious, but simple swaying in the Romberg position might mean weakness, nervous tension; it might mean fatigue. It might be due to any trouble; it might be due to a toxic condition, and if accompanied with other positive signs it takes on greater significance. He had symptoms of *commotio cerebri*. *Commotio cerebri* means a jarring or shaking of the head or brain.

Q. Is that brain concussion?

A. No, it is not concussion, exactly concussion, when you lose consciousness, but when the head is very much shaken, when you get a punch or jolt on the head and it jars you or shakes you, you might be dizzy for a minute but not unconscious. It is a jarring or shaking.

Q. You don't have to have unconsciousness to have concussion, Doctor? A. Yes, you do. I believe the dictionary says and most authorities say that concussion of the brain is a loss [58] of consciousness that follows immediately upon a blow to the head, followed by complete recovery. That is what the dictionary says on that.

(Testimony of Dr. Dorrell G. Dickerson.)

Q. When you examined him on January 9, 1943, was he still temporarily totally disabled?

A. Yes, I said temporarily disabled. Temporary total.

Q. At that time you did not know and would not attempt to make a statement of how long it would be before he would be able to return to work?

A. No; that would depend on quite a few things and what kind of work he could do.

Q. Doctor, I might say that he did return to work in the cannery on July 9th of this year.

A. At the time I saw him I did not think he could go back to work as a fisherman at that time. I haven't seen him since. I don't know.

Mr. Fall: That is all. You may cross examine.

Cross Examination

By Mr. Kappler:

Q. Doctor, in making the neurological examination, you have two types of symptoms to take into consideration, do you not? A. Yes, sir.

Q. Those symptoms are what?

A. Where the patient gives his complaints or subjective complaints, like headache, pain, vertigo, or loss [59] of sense of smell, that would be subjective. Objective is what you see or feel or hear or smell.

Q. In other words, objective signs or symptoms are those which you observe with your own eyes?

A. The special senses, yes.

Q. What objective signs did this man have on the occasion of your first examination?

(Testimony of Dr. Dorrell G. Dickerson.)

A. He had this healed scar on the top of his head. He had this swaying, when I asked him to put his feet together and close his eyes. They were the only two things you could see. Of course, his blood pressure, I took that.

Q. That would be classified as an objective sign?

A. That is objective, yes.

Q. All of his other symptoms were what you would call subjective? A. Yes, they were.

Q. Was the same true with reference to the examination which you made on January 9, 1943?

A. It was.

Q. Had the blood pressure changed any between your examination in August and your examination in January? A. It dropped a little bit.

Q. It dropped a little? A. Yes.

Q. Could the swaying in the Romberg posture at all be [60] attributed to the condition of the blood pressure? A. Yes, it could.

Q. Would you think that an elevated blood pressure in a man 59 years of age would have a bearing, or could have a bearing on the Romberg posture?

A. It is possible with an arteriosclerotic condition of an individual, the Romberg would be positive, and he would sway. You couldn't call it really a positive Romberg. In a Romberg, with an arteriosclerotic condition of the brain or nervous system, a person in middle life, of course the swaying is uncertain, or the equilibrium uncertain because of the condition of the brain.

(Testimony of Dr. Dorrell G. Dickerson.)

Mr. Fall: You say he is 59, counsel. I don't recall any testimony as to the age of the libelant.

Q. By Mr. Kappler: Did the libelant, Doctor, give you his age when you made your examination on August 1st?

A. Yes. I think I have it recorded here. The first time on August 1st he was 59, and the second time he was 59.

Q. When you say the term "sclerotic," you mean what?

A. I examined the brachial arteries by holding the arm up and feeling. You roll your finger, and if they feel hard and stiff, it is what we call palpable. That would indicate that the rest of the arteries in the body are in the same condition.

Q. Was that condition of arteriosclerosis at all [61] referable, Doctor, to trauma?

A. No, that is natural—I won't say natural, but the change occurs in the human anatomy with age and certain conditions. It is a disease—not a disease, but a natural progression of the circulatory system of the human being.

Q. In your examination of this man there wasn't anything to indicate to you that the blow which he received on his head had anything to do with the hardening of the arteries which he had? A. No.

Q. At the time the libelant was admitted to the hospital in San Pedro and his blood pressure was taken there on May 4, as indicated this morning on the chart, it was 160 over 80. Is that an elevated blood pressure, Doctor, for a man of this age?

(Testimony of Dr. Dorrell G. Dickerson.)

Mr. Fall: To which we object as asking for a conclusion and giving the doctor only a portion of what occurred on May 4th. I think the doctor is entitled to know whether it was after the man sustained this severe blow on the head and was in the hospital or when it was. I think the question is indefinite for that reason.

The Court: I think, counsel, it is proper on cross examination for counsel to ask these questions; then on your redirect you can straighten out any error that you [62] think was in the answer. Proceed, counsel.

(Question read by the Reporter.)

A. Yes, I would say that is somewhat elevated.

Q. By Mr. Kappler: When you examined him the blood pressure was what, Doctor, on the first examination?

A. The first time it was 160 over 85.

Q. In other words, it was practically the same as it was on May 4th?

A. From what you tell me, yes. I found it 160 over 85.

Q. And elevated blood pressure is not ordinarily caused by trauma, is it? A. No, it is not.

Q. In your opinion, based upon the facts that you got from this man and based upon the examination you made, do you believe that the elevated blood pressure that this man had was caused by the blow he sustained on the head on May 4, 1942?

A. I don't think the injury had anything to do with his blood pressure being elevated.

Q. Doctor, at the time Mr. Ruljanovich was under the care of the doctors at the United States Public

(Testimony of Dr. Dorrell G. Dickerson.)

Health Service, a blood count was run upon him, which indicated that he had 2,800,000 red blood corpuscles. Would that be indicative of anything to you?

A. Yes.

Q. Would it be indicative of anemia, for example?

[63] A. It is an anemia.

Q. Would that condition be one which would ordinarily be caused by trauma?

A. It depends. If you get a bad hemorrhage—

Mr. Fall: It is stipulated that it would not be.

Mr. Kappler: I accept the stipulation.

Q. Would you say, Doctor, that a man with a blood count of that character was suffering from secondary anemia?

A. It could be secondary anemia, yes, sir. If he had showed no evidence as a result of a great hemorrhage, I would say that it was secondary anemia without question.

Q. If I told you that on November 3rd of this year a blood count was run upon this man, which indicated he had 4,350,000 red cells and his hemoglobin was 78 per cent, would that indicate to you that he was suffering from secondary anemia?

A. That is a mild secondary anemia.

Q. Isn't it true, Doctor, that the presence of a secondary anemia in a man 59 years of age would have an effect on his health and well being?

A. It does.

Q. Wouldn't that be particularly true, Doctor, where this same man also had the sclerotic changes which you have referred to before?

(Testimony of Dr. Dorrell G. Dickerson.)

A. It would affect it for the reason that the blood vessels, if they are thickened or sclerotic, an insufficient [64] amount of blood passes to certain parts of the body, maybe the brain or head or kidneys, but if the blood is not in volume or in quantity delivered to that particular area it might cause symptoms.

Q. You found no evidence, I believe, which indicated this man had sustained a brain injury, did you?

A. No, I reported no organic brain findings. I thought he had suffered commotio of the brain, a jarring, but no loss of consciousness, or no organic changes that I could detect.

Q. Mr. Ruljanovich referred to a grabbing sensation in the area of the place where the wound was on top of his skull, and from the history which you gave a little while ago I take it that he gave you the same statement; is that true?

A. He said he had a grabbing sensation in his head, yes.

Q. Do you have any way of accounting for that, any reason you can think of which would account for that sensation?

A. No, that is one of the things people tell you, which you can't account for. I wouldn't know how to account for it. You have a lot of people who tell you things like that, and have no physical explanation of it.

Q. That sensation, in any event, would be on the surface of the skull?

A. It would be on the surface in the scalp, because [65] you have no feeling in the brain itself.

(Testimony of Dr. Dorrell G. Dickerson.)

Q. It is not indicative of a brain injury, is it?

A. No, you wouldn't experience a symptom like that. That is more of a subjective sensation from the scalp rather than from the inside.

Q. In other words, where you experience a brain injury from a blow, you have very definite signs that go along with that injury, don't you? For example, you have exaggerated reflexes; perhaps they might be exaggerated; they may be slight; they may be equal on one side and greater on the other? You might have failure of function of some part of the body?

A. Usually in the place where he was hurt. I don't think he had a brain injury, any organic brain injury that I could find.

Mr. Kappler: That is all.

Redirect Examination

By Mr. Fall:

Q. You did find his disability as a result of your general diagnosis? A. Yes, I did.

Q. The fact that he may have had a blow at one portion of the skull does not mean necessarily he is going to have an injury to the brain, an injury under that portion? He may have an injury by a contra coup?

A. That is possible, in certain injuries, certain [66] types of force that are direct, but unless it is a force directed from above, if you have a *countra* coup injury, it would be basal, and in all probability would kill the patient right then and there. Many times you strike the right side of the head and rupture a blood vessel on the left side, or vice versa, but I think if you get a

(Testimony of Dr. Dorrell G. Dickerson.)

blow on the top of the head sufficiently great to cause contra coup to the base, it would probably kill you, because there are so many vital structures there. I don't think that would be applicable here. I don't think he had sufficient force to injure his brain. That is my opinion.

Q. He told you that he was not knocked unconscious? A. Yes, sir, he did.

Q. Did he tell you he was quite hazy for a period of time after he was hurt?

A. No. He told me that he was knocked down, but did not lose consciousness, and he was taken to the San Pedro Hospital and was there seven days.

Q. He did not tell you anything about being taken to another doctor's office in the interim?

A. No, he did not. He said he was taken to the San Pedro Hospital, was there seven days, and was treated by physicians in the United States Marine Hospital service.

Q. He didn't tell you he was taken to Dr. Steller's office in Wilmington and there X-rays were taken, and that [67] the laceration was sutured at Dr. Steller's office?

A. He may have told me that but I haven't it in the record. I am not saying he didn't. I have here that he had a wound that was sutured.

Q. A blood count of 4,350,000 is within normal range, isn't it? A. Four million?

Q. 4,350,000? A. No, that is a little low.

(Testimony of Dr. Dorrell G. Dickerson.)

Q. You would say 4,500,000 would be within normal?

A. I would say it ought to be closer to 5,000,000.

Q. Four and a half million to five million?

A. Yes.

Q. The main thing was the hemoglobin. The hemoglobin percentage was within normal limits?

A. No, it was low. 70 per cent was low. It ought to be higher; say 300,000.

Mr. Kappler: I think, counsel, it was 76.

A. I thought he said 70.

The Court: 76.

Mr. Kappler: He said 78.

A. I thought he said 70.

Q. By Mr. Fall: There was a history of 70 per cent some time previous, Doctor, but I think on November of last year—no, November of this year it was 4,350,000, and with a 78 per cent hemoglobin. [68]

A. I misunderstood the figures. I might say in this particular part of the United States that would be considered normal, but it is not a healthy hemoglobin for everyone. The individual ought to be up to 80 or 90, but in California everyone has got secondary anemia, so I would say it would be normal for this part of the country.

Mr. Kappler: Are we weaklings out here, Doctor?

A. I think we do get a little soft, men especially.

Q. By Mr. Fall: Doctor, the vessels of the eye—what is it, fundi? A. The fundal vessels.

Q. Those vessels were normal?

A. Yes, they were normal.

(Testimony of Dr. Dorrell G. Dickerson.)

Q. In arteriosclerosis you usually find those vessels involved first, don't you?

A. Usually, but not always. It is usual, when you look into a man's eye, who has arteriosclerosis, you see a change; the retina is altered but not necessarily. There are cases where it is not present.

Q. You did not find it here?

A. No, I did not.

Q. So you don't know to what extent this condition of hardening of the arteries has gone?

A. You can only recognize that it is more or less general, but it isn't in the fundal vessels that I can see.

Mr. Fall: that is all. [69]

CLARK B. WALSWORTH,

called as a witness on behalf of the Libelant, being duly sworn, was examined and testified as follows:

The Clerk: Your full name, Doctor?

The Witness: Clark B. Walsworth.

Direct Examination

By Mr. Fall:

Q. Dr. Walsworth, what medical school are you a graduate of?

A. I graduated from the Los Angeles College of Osteopathic Physicians and Surgeons.

Q. What year? A. 1933.

Q. You have been practicing where since?

A. In San Pedro.

Q. What type of practice do you have?

A. General practice.

(Testimony of Clark B. Walsforth.)

Q. In the course of your practice did you have occasion to treat Mr. Ruljanovich? A. I have.

Q. When did you first see him, Doctor?

A. On the 9th of February, 1943.

Q. At that time did you make an examination of him? A. I did.

Q. What were your findings at that time?

A. As far as objective findings themselves, there [70] was very little found. The man had a laceration, an old scar on the skull, on the vertex of the skull, but other than that the essential findings were negative. His blood pressure at the time of the examination and repeated checks that day averaged around 125 over 80.

Q. How many times did you check it that day, if you recall?

A. I can't say definitely on that, but several times.

Q. On various occasions subsequently have you checked his blood pressure?

A. Every time the man has been in the blood pressure has been checked.

Q. About how many times have you seen him?

A. I believe ten times, on my history here.

Q. What is the highest blood pressure you found at any time?

A. The highest that I found at any time was 140 over 80.

Q. When was that? A. The 5th of March.

Q. Mr. Ruljanovich is a Yugoslav, as you know.

A. That is right.

(Testimony of Clark B. Walsforth.)

Q. Have you had occasion in your practice to examine a number of Yugoslavs in San Pedro?

A. I have.

Q. There are quite a few people in this country of that descent living in San Pedro? [71]

A. That is right.

Q. Have you found anything in reference to that in reference to taking their blood pressure, that you don't find ordinarily with other people?

A. They usually have a fear of it to some extent. At times it almost develops into a phobia. Many times I have seen them when you first examine them have a very high blood pressure, and then after talking with them and diverting their attention to other things, after a few minutes the blood pressure will drop quite markedly; and I find the more you become acquainted with the patient and he knows me that the blood pressure in the majority of cases will drop.

Q. As a matter of fact, they don't actually have high blood pressure?

A. It appears to be a fear of the blood pressure itself.

Q. Would you say that the red corpuscle count of 4,350,000, with a 78 per cent hemoglobin, in Mr. Ruljanovich, would be within his normal limits for his age?

A. It would be within normal limits of his age; possibly on the lower border of normal limits.

Q. Doctor, I think there is sufficient in the evidence to show that when he was in the hospital in May, 1942, he had a blood count of 2,800,000 and 70 per cent hemoglobin, at that time. That is definitely low? [72]

A. That is right.

(Testimony of Clark B. Walsforth.)

Q. Would you say at that time he was suffering from anemia? A. That is right.

Q. At the present time, Doctor, with a blood count of 4,350,000 and a 78 per cent hemoglobin, would you say he was suffering from anemia?

A. From a low grade secondary anemia, Mr. Fall. May I explain that in this respect? If we have to figure everything which is absolutely not within the so-called laboratory figures, it would have to be considered then as a secondary anemia. It may be one per cent or a small percentage over, but nevertheless, if you have to have something as a basis, it would be a low grade anemia.

Q. Would you expect him to have headache as a result of an anemia of that low grade?

A. With a blood count—

Q. Of 4,350,000? A. I would not.

Q. With a 78 per cent hemoglobin?

A. I would not.

Q. What were Mr. Ruljanovich's complaints when he first came to you?

A. He was complaining of a peculiar sensation of his scalp. He did not mention scalp exactly, or his head; it seemed to be a crawling on the outer surface of the skull. [73] He was complaining at the time of light headedness. He was complaining of pain in his neck.

Q. Did you prescribe anything for him after your examination? A. I did.

Q. What did you prescribe for him?

A. I prescribed two things; a preparation of prostigmine bromide, one tablet three times a day; then probably a tonic.

(Testimony of Clark B. Walsforth.)

Q. During the time that you saw him did you prescribe anything else or give him anything else?

A. In November of this year I recommended a general check-up and he was given at that time some elixir of caffeine, which is an iron liver tonic.

Q. During the time you saw him, from the period of February of this year in July, was there any improvement?

A. He was able to return to work in July. He hasn't recovered entirely but he has improved.

Q. He did improve sufficiently to return to work?

A. That is right.

Q. Had his complaints of light headedness cleared up? A. No.

Q. This condition you describe of his complaints, you have a history of his being in an accident?

A. That is right.

Q. In May, 1942; that he was in the hospital at San [74] Pedro for about one week?

A. That is right.

Q. And that the cause of his disability at the time was that a timber had fallen on his head, causing a laceration; that he was afterwards taken to the hospital. In your opinion was the condition which you found him complaining of the result of this accident?

A. In my opinion it would be possible for it to be, yes.

Q. Possible or would it be probable, or would it just be in the realm of possibility?

A. I would say it would be quite probable for it to be.

Mr. Fall: You may cross examine.

(Testimony of Clark B. Walsforth.)

Cross Examination

By Mr. Kappler:

Q. May I see your records, Doctor, please?

Mr. Fall: May I ask him a couple of questions on these bills, as to their reasonableness?

The Court: Proceed.

Q. By Mr. Fall: Doctor, I understand that Mr. Ruljanovich has paid \$28.00 to you. Is that a reasonable sum for the services that you have rendered?

A. I believe so.

Q. And Mr. Ruljanovich went to Dr. Cassidy on four different occasions. He was charged three bills at \$2.00 apiece and one bill at \$1.50. Would that be a reasonable [75] charge for an office call?

A. I would say it would be, yes. I don't know what was done.

Q. Well, he went to him and he examined him for this condition, and he was told to return; I don't know whether it was for observation. There is some evidence here that there were certain prescriptions given to him.

A. Yes, I think that they are reasonable.

Mr. Fall: Counsel, will you stipulate that Dr. Dunbar's bill, amounting to \$13.00, for five calls, would be reasonable?

Mr. Kappler: Yes; that is subject, of course, to the same objection.

The Court: Yes.

Mr. Kappler: I will stipulate to the reasonableness.

The Court: All right.

(Testimony of Clark B. Walsforth.)

Q. By Mr. Kappler: Doctor, as I understand your testimony, the figure they gave of Dr. Dickerson, which was in turn given to you by Mr. Fall, of 4,350,000 red blood cells, would indicate a mild secondary anemia; is that right?

A. Yes, that is right.

Q. Let me ask you this: What would the figure of 3,680,000 red blood cells indicate to you?

A. That would be a lower grade of secondary anemia.

Q. That would be even lower? [76] A. Yes.

Q. Isn't it true that on November 5 of this year you had a blood count performed on Mr. Ruljanovich and at that time he had a red blood count of 3,680,000?

A. I have the record there. I don't remember the date. Yes.

Q. Isn't it also true that on December 14 this year you had another count run, which indicated he had 3,800,000 red blood cells?

A. That is right.

Q. Both of those figures are lower than the normal limits, aren't they, Doctor?

A. That is right.

Q. Wouldn't you say that a hemoglobin count of 76 per cent was a little low?

A. Possibly a little low.

Q. As I understand it, from your records, this patient was referred to you by Mr. Fall?

A. That is right.

Q. What would you consider to be the normal blood pressure of this man, 59 years old?

A. The present conception of blood pressure would be between 130 and 140.

(Testimony of Clark B. Walsforth.)

Q. You say that the highest this man ever recorded for you was 140 over 80?

A. I notice one place 145. Then it dropped to 140.
[77] That was one time only.

Q. Would you consider 140 high for this man?

A. No.

Q. In other words, would you consider 140 to be a normal blood pressure?

A. It is generally considered to be a normal blood pressure, within normal ranges.

Q. It was 140 the very first occasion you ever took it, wasn't it? A. No.

Q. It was 125 over 80? A. Yes.

Q. Why did you then undertake to run three or four blood tests on the same day?

A. Because he was as amazed about it as I was. The man had told me he had been repeatedly checked and had been told he had high blood pressure, and I was as surprised as he was.

Q. I notice you prescribed biferin.

A. Biferin.

Q. That is an iron preparation?

A. Yes, put out by Lederle; iron and liver.

Q. That was to raise the hemoglobin?

A. That was to raise the hemoglobin and the red blood cells.

Q. And the red blood cells? [78]

A. That is right.

Q. This elixir that you testified about—

A. That was the same type of preparation.

(Testimony of Clark B. Walsforth.)

Q. The same type of preparation?

A. That is right.

Q. You prescribed vitamin B complex, didn't you?

A. Yes, I did; I notice that.

Q. That of course is something that builds a person up generally, isn't it?

A. That is true. At this time it is being found very useful in the treatment for neuritis and nervous involvements, such as Mr. Ruljanovich was complaining of.

Q. You didn't give to this man any

A. No, sir, I have never given it to him.

Q. What did you give him for the relief of his headache?

A. Mr. Ruljanovich was not complaining, as I interpret it, of a real headache. It was more, it seemed, a disturbance of the scalp, on the surface covering of the scalp.

Q. In other words, he complained of having a feeling that the scalp was crawling?

A. I believe so.

Q. He wasn't complaining of headache as such?

A. Not as such.

Q. What did you give him for dizziness?

A. I used prostigmine bromide; which is prescribed and [79] used for concussion cases at the present time.

Q. Did you prescribe that for him on the occasion of his first visit? A. Yes.

Q. How long did he continue to take prostigmine bromide? A. He should still be taking it.

(Testimony of Clark B. Walsforth.)

Q. Did you give him more than one prescription?

A. No, it is to be refilled.

Q. It can be refilled? A. Yes.

Q. You instructed him that it could be refilled?

A. I talked to him about it, yes.

Q. To your knowledge has he been taking prostigmine bromide? A. I don't know recently.

Q. Unicap, what is that for?

A. It is purely a vitamin preparation for tonic.

Q. You say under the heading "Cardio respiratory: Vessels palpable." What do you mean by that, Doctor?

A. Certain vessels on examination are not collapsible; they are more easily felt than others.

Q. You didn't find any evidence of any swaying in the Romberg posture, did you?

A. The Romberg was negative.

Q. Would you say from your examination that this man [80] had a moderate generalized arteriosclerosis?

A. I don't believe so.

Q. It would be your opinion that he had none at all?

A. No, I believe that he possibly has some; it would be commensurate with a man of his age; but it is very slight, if it is.

Q. In other words, you feel he has a normal sclerosis?

A. I feel that he has the normal change of a man of his age.

Q. Whatever change there is in that regard, would not be associated with any blow on his head?

A. Will you repeat that please?

(Testimony of Clark B. Walsforth.)

(Question read by the reporter.)

A. That is right.

Q. Did you perform upon this man a neurological examination?

A. Yes, such as is able to be done in general practice.

Q. Did you test him to see if he had any Babinski?

A. I did.

Q. What was it? A. Negative.

Q. Did you examine him with the ophthalmoscope?

A. I did.

Q. What did that reveal, if anything?

A. Nothing.

Q. Was there any evidence of nystagmus? [81]

A. No.

Q. What is nystagmus?

A. Nystagmus is either the side to side or vertical movement of the eyes when attempting to follow an object along a given path.

Mr. Kappler: That is all.

Mr. Fall: I have no further questions.

NEAL D. GIBSON,

called as a witness on behalf of the Libelant, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Neal D. Gibson.

Direct Examination

By Mr. Fall:

Q. Mr. Gibson, by whom are you employed?

A. The Crescent Warehouse Company.

(Testimony of Neal D. Gibson.)

Q. The Crescent Wharf & Warehouse, or Crescent Warehouse?

A. I am really employed by the Crescent Warehouse Company. It is a branch of the Crescent Wharf and Warehouse.

Q. That is on Terminal Island?

A. That is right.

Q. On May 4, 1942, were you at the warehouse when Mr. Ruljanovich received an injury?

A. I was.

Q. Shortly before this were you in the office of the [82] Crescent Warehouse Company?

A. Yes, sir.

Q. What was the occasion of your going to the warehouse?

A. I go to the warehouse during business hours every day. I am employed there.

Q. On this particular occasion you went out to the warehouse just before Mr. Ruljanovich received an injury?

A. I went to that part of the warehouse.

Q. What part of the warehouse was it?

Q. There is another door than the main entrance about, oh, maybe 70 or 80 feet from the main entrance, another door.

Q. What was the occasion of your going down there?

A. Because the office informed me that this sardine fish net was to be picked up and delivered.

Q. Where did you go; to the door inside the warehouse or outside?

A. On the inside.

(Testimony of Neal D. Gibson.)

Q. When you got to the door what did you do?

A. I opened the door.

Q. Was there a truck outside then?

A. At that time the truck swung around there, and started backing in, just as soon as I got the door open.

Q. Were there any men there that came in the warehouse?

A. Yes, some of the men followed me around through the inside entrance, and I think some came from the outside [83] when I opened the door.

Q. As the truck was backing in, whereabouts were you?

A. As quick as I opened the door and I stood there a minute or so, he backed in crooked, so I stepped up on the platform, jumped on the truck, and helped the driver, to assist him.

Q. Where was the net with reference to the door of the warehouse, that is, facing the door from the outside, was it to his right or to his left?

A. It was to the right, directly against the front wall, and to the right of the ramp.

Q. Where the truck would come in there is a ramp?

A. That is right.

Q. Did you notice a man attempt to, or did a man get on the truck as it was backing in the warehouse?

A. No, the truck backed in sort of crooked, and I got up on the truck to assist him, and when the truck started forward, then another man jumped on the truck.

Q. Do you know who that man was?

A. He was just one of the crew that came there, that is all I know.

(Testimony of Neal D. Gibson.)

Q. What, if anything, happened when he got up on the truck?

A. When he got up on the truck the timber started falling, and of course I hollered. [84]

Q. Where was the timber standing immediately before he tried to get on the truck?

A. It was standing just beside the door.

Q. On what side of the door, as you faced it from the outside?

A. It would be just to the right of the entrance behind the door track.

Q. That door is a door sliding up and down, is it?

A. That is right.

Q. And it rolls up to the top of the door into a roll?

A. That is right.

Q. The 4 by 4 was immediately beyond—

Mr. Kappler: I will object to that as leading.

Mr. Fall: I will withdraw the question. I am sorry.

Q. Where was the 4 by 4 with reference to the edge of the track?

A. Standing between the track and another 4 by 4 that was stationary there.

Q. How far from the track was this 4 by 4 that was stationary?

A. Well, I would say that part of the track, probably at the top of the 4 by 4, was probably touching the track.

Q. There was a 4 by 4, you say, that was stationary?

A. Yes, sir.

(Testimony of Neal D. Gibson.)

Q. How far from the track was that 4 by 4?

A. Just a matter of a few inches; I would say about [85] 3 inches.

Q. Was the 4 by 4 leaning up against the wall; is that correct?

A. Yes, sir.

Q. It wasn't stationary. And how far from the bottom of the wall was the bottom of that 4 by 4?

A. I would say about a foot and a half.

Q. How long was that 4 by 4, if you know?

A. Somewhere between 15 and 18 feet.

Q. When this man got up on the truck what, if anything, did he do with his left hand?

A. With his left hand he sort of assisted himself by taking hold of this 4 by 4.

Q. What happened to the 4 by 4 then?

A. He immediately pulled on it, setting it in motion, and it fell over.

Q. Which way did it fall from the wall? It was leaning against the wall?

A. That is right.

Q. Which way did it fall from the wall?

A. It fell directly opposite of the wall.

Q. So if this pencil were the 4 by 4, it was pulled out away from the wall?

A. Yes, sir.

Q. What happened to that 4 by 4 then?

A. Well, it hit this man on the head. [86]

Q. What happened to him then?

A. He was immediately assisted by a couple of his companions and someone took out a handkerchief and put it on top of his head to absorb some of the blood. He was sort of down in a crouched position, but he was assisted by these men and taken out to the car.

(Testimony of Neal D. Gibson.)

Q. At that time did he talk at all?

A. No, he just sort of murmured, I would say.

Q. Do you see any man in the courtroom that was the individual that got on the truck and pulled this 4 by 4 away from the wall?

A. I wouldn't recognize him, no, sir.

Q. After this man left in the automobile, was the net put on the truck?

Mr. Kappler: That is objected to as being immaterial, your Honor. It occurred after the accident, and has nothing to do with this case.

Mr. Fall: That net was taken over to the boat.

The Court: I think, counsel, for instance, after the accident, if the man had gotten up and walked away, that would be an element.

Mr. Kappler: That is true; but he is now asking him about what happened after Mr. Ruljanovich was taken away.

Mr. Fall: I am referring to the net. Was the net taken on the truck?

Mr. Kappler: I will stipulate that it was. [87]

Mr. Fall: I want to show that the net was actually taken away and put on the "Betsy Ross."

The Court: Counsel has settled that for you.

Mr. Fall: You may cross examine.

Cross Examination

By Mr. Kappler:

Q. How long have you been employed at the Crescent Warehouse Company?

A. Around ten years.

(Testimony of Neal D. Gibson.)

Q. What capacity do you have down there?

A. Warehouse foreman.

Q. In other words, you were in charge of the whole warehouse down there, weren't you?

A. That is right.

Q. Mr. Cekalovich, Mr. Muljat and Mr. Mratinich, owners of the "Betsy Ross," had rented space from the Crescent Warehouse Company, wherein they could store their net, didn't they?

A. Yes, sir.

Q. How long had they had their net stored there prior to May 4, do you know?

A. No, I don't have anything to do with the office records.

Q. Do you know approximately how long it was there?

A. No; there are so many fish nets, I don't recollect just how long they do stay there. [88]

Q. When was the loose 4 by 4 you are talking about, that was 16 to 18 feet in length, placed against the wall of the building?

A. Well, I would say a month or longer before the accident happened.

Q. In other words, this loose timber was allowed to remain there for about a month before this accident?

A. Yes, sir.

Q. Would you say that that timber was about as high as this standard on which the flag is raised?

A. Maybe a little longer.

Q. Maybe a little longer than that, and it was leaning up against the wall of the building so that the foot, the base of the timber, was about a foot and a half out from the wall?

A. That is right.

(Testimony of Neal D. Gibson.)

Q. I have here three photographs—

The Court: If you are going to show the witness those, you had better have them marked for identification, just so we know what you are discussing.

Mr. Kappler: All right.

Mr. Fall: I have no objection to all of them going into evidence. They may go in at this time without laying the foundation.

Mr. Kappler: All right.

The Clerk: They will be Respondent's and Claimant's [89] Exhibits B, C and D, respectively, in evidence.

Q. By Mr. Kappler: I have here, Mr. Gibson, three photographs which were taken, I am told, very shortly after this accident occurred. The fishing net, of course, has been removed from the dock, which is just to the right of the ramp as you enter the building. Exhibit D is a true and accurate representation of the condition of the premises there at the time of the accident, with the exception that it does not, of course, portray the net which had been stored there, and with the further exception that it does not portray any loose 4 by 4 timber; is that true? A. That is right.

Q. Would you like to see them (to counsel)? Mr. Gibson, will you point out to me where this loose 4 by 4 timber, 16 or 18 feet in length, was standing?

A. This is the track that the door runs up and down on.

Q. Let us make a mark there. When you say this is the track that the door runs on—

A. That is right.

(Testimony of Neal D. Gibson.)

Q. We will mark that "N.G." your Honor.

The Court: Just mark it A.

Q. By Mr. Kappler: This being the stationary beam referred to, the stationary 4 by 4?

A. That is right.

Mr. Kappler: May we mark that B, your Honor?

The Court: Yes. [90]

Q. By Mr. Kappler: That beam was fixed in position and was there all the time, is that right; at least it was there at the time of the accident? A. Yes.

Q. It was affixed at the top and bottom in some manner?

A. That is right, it is fixed there permanently.

Q. Let me ask you this: Is there any space or area between the back of this beam and the edge of the wall?

A. No, it is supposed to be practically as close as you can put it.

Q. Will you draw a little cross to indicate the place on the ramp where the base of this 4 by 4 was?

A. It was right against this ramp; a foot and a half from the wall. It would be right against there.

Q. Let us mark that C, please, where the base of the 4 by 4 was located. As I understand it, the 4 by 4 then extended from this point up to the point on the wall, is that correct? A. That is correct.

Q. Was there anything to hold the top of the 4 by 4 to the wall? A. Just gravity.

Q. Just gravity. There was no nail or any other device to hold it there? A. No, sir.

(Testimony of Neal D. Gibson.)

Q. Was the side of this 4 by 4 up against the edge of [91] the concrete ramp, or the dock ramp?

A. Yes, it was right up against it.

Q. So that the 4 by 4 was located in the space which appears between the edge of the concrete dock and the edge of the place where the door rolls up and down?

A. I would say there was about four inches or so in between there, that extended up in. This track would be about 4 to 6 inches wide; then this concrete pillar would extend on out there about another 6 inches. I would say it was about a foot over from the driveway.

Q. As you look at this track which is marked A, there would then be a space in between the edge of the track and the edge of the concrete, which was approximately 4 inches wide, is that correct? A. Yes.

Q. In other words, it is shown better perhaps in Exhibit B? A. Yes.

Q. The area in here is approximately 4 inches?

A. Yes, four or five inches.

The Court: I think it is just as clear on the other exhibit, counsel.

Mr. Kappler: I think it is.

The Court: I wouldn't mark another one; it would confuse the record.

Mr. Kappler: That is marked D, that space between the [92] concrete and the edge of the space where the door rolls up and down, approximately four to five inches in width.

Q. Where was the rear of the truck when you jumped up on it?

(Testimony of Neal D. Gibson.)

A. I imagine the rear left side would probably be right around here.

Q. E represents the place where the rear of the truck was at the time the witness jumped up on the bed of the truck. That, Mr. Gibson, was a flat bed truck, was it?

A. Yes; a flat bed, semi-truck.

Q. What was the distance from the service ramp to the top of the concrete dock?

A. About two feet and a half.

Q. That refers to the highest edge near the door?

A. Yes.

Mr. Kappler: I will mark that here.

Q. How high would you say it was up here at the other end; about two feet?

A. Well, what do you mean by the other end? I think they are about 6-inch boards there, planks on the concrete. I imagine here would be one foot. The top of the ramp comes up directly from the floor level.

Q. Where were you standing when you jumped up onto the bed of the truck?

A. I walked up along here, with one hand on the net. I would say I jumped up onto the truck— [93]

Q. Right here?

A. Yes.

Q. This point F-1?

A. Yes.

Q. When you jumped up onto the bed of the truck, how much distance was there from the top of the concrete on which you had your foot and the bed of the truck? What was the distance above?

A. About a foot and a half or two feet.

Q. As I understand it, after you jumped up onto the truck the truck proceeded on out farther into the driveway and then backed up in again, is that correct?

A. No, he was going out to back up again.

(Testimony of Neal D. Gibson.)

Q. He was going out to back up again?

A. Yes.

Q. Did the fisherman jump onto the truck while the driver was on his way back in?

A. No, just practically at the time he started pulling out to straighten out.

Q. At that time where were you on the body of the truck?

A. I was up pretty well to the front end, where I told the driver to pull up and get over.

Q. Were you facing toward the net or were you facing toward the cab?

A. I was facing toward the net. [94]

Q. You were looking right at the man who jumped up onto the truck, weren't you? A. Yes.

Q. As you saw him there, as I understand it, you saw him reach out and put his hand on this four by four? A. Right.

The Court: Was that the libelant?

Mr. Kappler: No, your Honor; one of the other members of the crew.

The Court: That was some other member?

Mr. Kappler: That is correct.

Q. While you were up on that truck you saw this other man reach over in an effort to get on the truck, and put his hands on the 4 by 4?

A. That is right.

Q. You saw him pull that 4 by 4 as he got up on the truck?

A. I saw the 4 by 4 move. I couldn't see him, as to any pulling, but I saw the 4 by 4 move when he did it.

(Testimony of Neal D. Gibson.)

Q. Prior to the time he jumped up onto the truck you saw he was pretty close to the end of the concrete dock there, didn't you? A. Yes, sir.

Q. Did you yell out a warning to anybody?

A. I yelled, "Look out!"

Q. Did you warn this crew member before he attempted [95] to get up onto the truck, that there was a loose 4 by 4 standing there right next to this member that allows the sliding door to go up and down?

A. No, sir; I did not think he had no business on there until the truck was ready for him to put on the net.

Q. In other words, you never at any time warned anyone of the fact that this timber was not fastened in the right manner?

A. No, sir, I did not have time to.

Q. You made no attempt to move this timber prior to the time that an effort was made to get the net out of there? A. I did not have time.

Q. You made no effort to move the timber prior to the time you opened the door, did you?

A. The truck began moving in immediately, and I proceeded to help him back the truck in.

Q. The truck did not start to move up until after you opened the door, did it?

A. Right directly afterwards.

Q. Before you opened the door, of course, the truck was on the outside, and you made no effort at that time to attempt to move this 4 by 4 timber, did you?

A. No, sir; it was dark in there; I couldn't even see it, in fact.

(Testimony of Neal D. Gibson.)

Q. You couldn't even see it? [96]

A. Not very plain.

Q. Despite the fact, however, that you knew it had been there a considerable period of time?

A. It had been there so long that I had forgot about it.

Q. Did you have occasion to observe the surface of the ramp after the fall of the 4 by 4 timber, in the immediate area where the base of the 4 by 4 had been resting prior to falling?

A. I don't know as I exactly get what you mean.

Q. Isn't it a fact that you and police officer Bonk and several other persons examining the ramp at the place where the base of the 4 by 4 had been prior to the time it fell?

A. Yes, it has been there so long it had made a print in the asphalt, you might say.

Q. Let me ask you this, Mr. Gibson: Will you examine Respondent's Exhibit B and tell me whether or not this area that I am now pointing to is not the area that you observed after the timber fell, and which apparently represents a mark in the surface of the ramp left by the timber?

A. It looks like that might be, to me.

Mr. Kappler: I would like to mark that, your Honor, G on Exhibit B.

The Court: You are referring to the white area that is a little bit lighter than the rest of the area? [97]

Mr. Kappler: That is correct. (Q) So that the court may know what the situation was, how high was the net piled up there on this dock?

(Testimony of Neal D. Gibson.)

A. I would say about 5 to 6 feet, between there.

Q. In other words, it was up 5 or 6 feet in the air, but this timber, however, was up considerably higher than the net? A. Yes.

Q. The only thing I am not clear about, Mr. Gibson, is this: You claim that this seaman pulled the board away from the wall, or he leaned on it in an effort to get onto the truck?

A. He sort of pulled on it, the same as you would when you are walking on an incline or anything like that, to jump up on something higher.

Q. Being 16 or 18 feet in length, this board did not have much of an angle to it, did it?

A. About the regular angle, the same as lumber is piled.

Mr. Kappler: I think that is all.

Redirect Examination

By Mr. Fall:

Q. Mr. Gibson, the space on Exhibit D that has planking laid down on the floor of the warehouse, is that the area on which the net was lying?

A. That is right.

Mr. Fall: I have no further questions. [98]

Q. By the Court: Did you see the timber fall?

A. That is right.

Q. Did you see who it hit? A. Yes.

Q. Who did it hit?

A. This Steve Ruljanovich.

Q. Where was he standing?

(Testimony of Neal D. Gibson.)

A. Well, on this here, he would be behind the truck; as the truck went to pull up he started to go over into this area in here.

Q. He stepped up there?

A. Yes, he went to step up there to go in behind that.

Q. By Mr. Fall: That would be just about here?

A. Yes.

Q. At the point marked H, which indicates about the point that Mr. Ruljanovich was?

The Court: That was on the ramp?

Mr. Fall: On the ramp; that is H, on Exhibit D.

Q. By Mr. Kappler: Was he on the ramp or on the dock?

A. He went to walk, step up on there, up on the floor level.

Q. How long an interval elapsed between the time that this seaman put his hand on this 4 by 4 and the time that the beam fell over and struck this man on the head? A. Just a matter of a few seconds. [99]

Q. What light did you have in the warehouse?

A. There were skylights in that part of the building; then with the door open, he was right next to the door; plenty of light.

Q. In other words, as you looked out the door, of course, you would see outside light; is that it?

A. It was all open out there, if that is what you mean.

Q. Was the sun shining that day?

A. I don't know.

Mr. Kappler: That is all.

GEORGE ZITKO,

called as a witness on behalf of the libelant, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: George Zitko.

Direct Examination

By Mr. Fall:

Q. Mr. Zitko, were you a member of the crew of the "Betsy Ross" at the time Mr. Ruljanovich was injured? A. Yes.

Q. Were you one of the men that went over to the Crescent Warehouse to get the net, the morning that he was injured? A. Yes, sir.

Q. After the door was opened to the warehouse, and [100] about the time the truck started to back in, where were you standing, or where were you?

A. I was outside the door of the warehouse.

Q. Then did you come inside the warehouse?

A. No.

Q. Were you outside the warehouse when Mr. Ruljanovich was injured?

A. Well, yes, I was that time outside too.

Q. Were you near the doorway?

A. Yes, right in the corner.

Q. When you refer to the corner, if you will look at Respondent's Exhibit C, which corner of the door were you standing near? A. This is it.

Q. That is looking outside?

A. Outside, in the warehouse.

Q. Yes.

A. I was right here. I was eating a sandwich.

(Testimony of George Zitko.)

Q. Were you outside the door?

A. Right here, on the corner.

Q. On the corner, but outside? A. Outside.

Q. Did you see this timber falling?

A. Yes, sir.

Q. Just about that time or just before, did you see one of the members of the crew get on the— [101]

Mr. Kappler: I object to that as being leading, Your Honor, and suggestive.

Mr. Fall: I think it is.

Q. Did you see anyone get on the truck?

A. No, I saw one on the net.

Q. One on the net? A. I think on the net.

Q. Who was that? A. Frank Muljat.

Q. Did he get on the truck?

A. Well, I didn't see him on the truck. Just before the truck was going in, he was on the net.

Q. He was on the net before the truck went in?

A. Yes; then when the truck was going back and forth, I have no chance to see if he was on the net or not.

Q. Did you see the timber falling?

A. Yes, I have a chance, because there wasn't even half the truck inside.

Q. After it fell did you hear any conversation with reference to the timber falling or what caused it to fall?

A. Well, afterwards, when I grabbed Mr. Ruljanovich—four of us was there; Frank and Caruso, myself—five all together.

Q. Frank is Frank Muljat?

(Testimony of George Zitko.)

A. Yes; he was there too. Then afterwards I heard that he touched the 4 by 4— [102]

Q. Just a minute.

The Court: Yes, it may go out.

A. But I didn't see him touch—

The Court: That is all right; you have answered.

Q. By Mr. Fall: Did Mr. Muljat make any statement, or say what caused the 4 by 4 to go over?

A. No, not what I know.

Q. You went over, did you, and helped pick up Mr. Ruljanovich?

A. Well, they brought him outside at that time, and I helped them guys, because I was next to him.

Q. When they brought him outside was Mr. Ruljanovich conscious? A. At that time, yes.

Q. Did you talk with him?

A. Afterwards, you know; I couldn't say, ten or fifteen minutes.

Q. Did you try to talk with him before the ten or fifteen minutes?

A. I did. He just was crying. I did ask him a question, but he didn't answer me at that time.

Q. He didn't answer you?

A. No, he was crying, and kind of moaning.

Q. Were you in the automobile that went over to Wilmington? A. Yes, sir. [103]

Q. Did he walk to the automobile?

A. No. We grabbed him, then a fellow opened the door and we stuck him inside on the seat.

Q. After you got to Wilmington, did he walk from the automobile up to the doctor's office?

A. We were three of us, me and Mr. Muljat and Mr. Cekalovich. Mr. Cekalovich put one arm on our

(Testimony of George Zitko.)

neck, on each side, helping, underneath his arms, to carry him inside.

Q. At the doctor's office, did you stay there when the stitches were taken? A. Yes, sir.

Q. Were you in the room when the stitches were taken? A. I was right there.

Q. What did the doctor do just before he put the stitches in his head?

A. First the nurse came. She shaved him all around. He was down on the knees on the table; then the doctor came, and I believe the nurse took the X-ray; the nurse, she took an X-ray, and then he was like that, I believe, for fifteen minutes, maybe more; I couldn't say; then the doctor, afterwards when he saw the picture, he started to work on him, to make the stitches.

Q. Did you stay there until he was taken away to San Pedro? A. Yes.

Q. How did they take him [104]

A. In an ambulance.

Mr. Fall: That is all.

Mr. Kappler: No questions.

PETER CEKALOVICH,

called as a witness on behalf of the libelant, being first duly sworn, was examined and testified as follows:

The Clerk: What is your full name?

The Witness: Peter Cekalovich.

Direct Examination

By Mr. Fall:

Q. I am calling this witness under Section 2055 of the Code of Civil Procedure.

(Testimony of Peter Cekalovich.)

Mr. Cekalovich, are you the master of the "Betsy Ross"? A. Yes.

Q. Were you the master of the "Betsy Ross" on May 3 or May 4, 1942? A. Yes.

Q. You have continuously been the master since that time? A. Yes.

Q. And some time prior thereto?

A. Not continuously, because I was sick for a while, and Frank was the master for a few days, but I was continuously almost, but a few days.

Q. That is Frank Muljat? [105]

A. Yes.

Q. He was also one of the owners of the boat?

A. Yes.

Q. You are one of the owners?

A. That is right.

Q. Mr. Mratinich was also one of the owners?

A. That is right.

Q. On the 3rd day of May did you have any conversation with Mr. Ruljanovich with reference to his being employed as a member of the crew of the "Betsy Ross"? A. Yes, I did.

Q. What did you say to him and what did he say to you?

A. I need the man to go fishing with me. I asked him if he wanted to go fishing with me.

Q. What did he say?

A. Well, he said he was kind of thinking whether to go or not, because I asked him several times before to come fishing. He said, "Well, I think I would come,

(Testimony of Peter Cekalovich.)

if you keep me on for sardines," because he figured the tuna season was not so very good, and that is why he wants to be on the sardines.

Q. What did you tell him?

A. I told him I never quit anybody that is good on the boat. He could continue to fish with me, if he was willing to come.

Q. Did you tell him he could fish then for both the [106] tuna and the sardines? A. Yes.

Q. Then on the next day did he go down to the boat? A. Yes; I took him down in my car.

Q. The boat at that time was at the Southern Pacific slip, wasn't it? A. That is right.

Q. That is on the San Pedro side of the channel? A. Yes.

Q. Did you have him do some work there on the boat that morning?

A. When they came on board, just let go the lines, and I had Frank take the boat over. I went over with my car.

Q. When you speak of Frank— A. Muljat.

Q. Did you drive over to Terminal Island yourself in your car? A. That is right.

Q. When you got over to Terminal Island did you tell some of the crew to go to the warehouse and get a net?

A. When I drove over there I went already to the warehouse. I found out I had to get an order first to get it, to get the net, so I arranged for that already. Then I went to the boat, and when came the boat I told the men to clean out the turntable, clean out the net

(Testimony of Peter Cekalovich.)

place for [107] the net, to put it in, and then I guess some of them were eating a little bit before we went over there, having a bite to eat, and then Rudolph Carr, of the Marine Hardware Store, he was there, and I asked him if he could come over with the truck he had. I said, "You had better take them over there. What is the object of making a couple of trips in my car?" My car is a new car, and the boys sometimes have a little tar on them, and I don't like to dirty it too much, so I say to take the boys over and all went there except myself.

Q. The boys went in the other truck of the Marine Hardware Company? A. That is right.

Q. That was not the truck you were going to bring the net back in?

A. No, it was just a little truck.

Q. Were you there when Mr. Ruljanovich was injured? A. I was back of the truck, yes.

Q. Did you see whether or not Mr. Muljat was getting on the truck from the dock just before this 4 by 4 fell?

A. Well, it was the driver, he was backing in and out in order to come in alongside of the ramp, to come closer, so it would be easier to put the net on the truck. He couldn't make it. He tried a couple of times and he couldn't make it very well, so I told one of the guys for somebody to jump up on the truck and direct the driver how [108] to come in. He had a big platform truck. I just happened to look at the side when I said that, and somebody jumped—Frank jumped, but where he was I couldn't exactly tell you. I was looking side-

(Testimony of Peter Cekalovich.)

ways. The other man was directing, trying to get the truck in and start to work.

Q. With reference to the time that Frank jumped on the truck, when was it that this 4 by 4 fell?

A. Well, it fell right straight back, but where the timber was lying I couldn't see it.

Q. Did that fall just about the time that Mr. Muljat got on the truck?

A. I couldn't say exactly, because I didn't see him really jump on the truck.

Q. Did Mr. Muljat tell you afterwards that he was the one that grabbed the 4 by 4 and then it fell?

A. No, he didn't say exactly that he grabbed the 4 by 4; he just said he put his hand on something, put his hand on something, maybe up against the wall, but he didn't say he put it here and there; he say he put it on something, the way he jumped up.

Q. He said he put his hand on it when he jumped up?

A. Yes, but I don't know; he said that; I don't know what he put it on.

Q. Didn't he afterwards say that he was the one who actually pushed the 4 by 4 over? [109]

A. He never told me that.

Q. The food that you have on the "Betsy Ross" when you are fishing, do you have good food?

The Court: Has that anything to do with the case?

Mr. Fall: Certainly, Your Honor. I want to lay the basis for maintenance and that is the only way I can show the value of the food.

(Testimony of Peter Cekalovich.)

The Court: There is no question in the answer here that there wasn't good food on the "Betsy Ross"?

Mr. Fall: I am trying to show that it was good food.

The Court: The answer doesn't challenge that.

Mr. Fall: No, Your Honor, but I must put in evidence the value of the food as the basis for the maintenance.

The Court: That is all right, but as to the question of whether it was good or bad—

Mr. Fall: I did not mean it that way.

Q. Do you know approximately the cost of the food for each man, for the "Betsy Ross"?

The Court: Per meal?

Mr. Fall: No; per day.

Mr. Kappler: I am going to object to that as being immaterial, Your Honor. It is not the true test of what this man would be entitled to recover. The maintenance would not be covered by what the food cost on board the ship, I take it.

Mr. Fall: The cases hold that he is entitled to [110] maintenance in a sum equal to that of the value of what he received on board the ship.

The Court: I will let you put your proof in because it is before the court, without a jury, and I will take care of these matters when it comes to the law. Answer the question: What was the cost of feeding each man one day on the "Betsy Ross"?

A. Your Honor, it depends on how much value you get from one month to another month; there would be

(Testimony of Peter Cekalovich.)

a lot of difference; but on the average I would say around \$1.25 a day or \$1.50. [111]

Q. It averages between \$1.25 and \$1.50 a day, doesn't it? A. Somewhere around that.

Q. When you make your shares at the end of the dark you at that time, off of each man's share, take the cost of groceries, is that right? A. Yes.

Q. From those figures you get an idea of how much a day it has cost you for that dark?

A. That's right.

Q. The men, of course, live on the boat when they are in San Francisco? A. Oh, yes.

Q. Your boat fishes sardines, and did fish sardines for part of last season, that is, a year ago, in San Francisco? A. In Monterey.

Q. How many darks did you fish up there?

A. Two darks. Not quite—wait a minute. Just about two darks.

Mr. Fall: I have no further questions.

The Court: Any cross examination?

Mr. Kappler: No.

Mr. Fall: Counsel for the respondents and I can stipulate on the amount of the 1/17 share for the tuna and sardine seasons which Mr. Ruljanovich was employed, as [112] \$5050.46.

The Court: Was that the total catch?

Mr. Fall: That was 1/17 lay. That is what each member of the crew was paid.

Mr. Kappler: I will stipulate, Your Honor, that that figure represents 1/17 share which Mr. Ruljanovich

(Testimony of Milica Ruljanovich.)

would have gotten if he had continued on and fished those two seasons. If Your Honor should find that this man is entitled to 1/17 lay, then, of course, he would be entitled to that sum under that stipulation.

The Court: What are the two seasons that started in May, 1942?

Mr. Fall: I have the records here.

Mr. Kappler: Yes, they commenced in May of 1942; May 9, I believe it was, to and including February 16, of 1943.

Mr. Fall: That is correct. [113]

MILICA RULJANOVICH,

a witness called by and on behalf of the libelant, having been first duly sworn, testified as follows:

(George Ivankovich was here sworn as interpreter in the Croatian and English languages.)

The Clerk: What is your full name, please?

A. Milica Ruljanovich.

Direct Examination.

Q. By Mr. Fall: Mrs. Ruljanovich, you are the wife of Steve Ruljanovich? A. Yes.

Q. Who took care of Mr. Ruljanovich after the accident, when he was home? A. I did.

Q. Did he complain of any pain during the time that he was home, immediately after the accident?

A. Yes, he always did, when he came home.

Q. Did he complain of dizziness during that time?

A. Yes, he always did.

(Testimony of Milica Ruljanovich.)

Q. Did he complain of any of those things at any time before the accident? A. What?

Q. Did he complain of any of those things, either pain or dizziness, at any time before the accident?

A. No, he never did.

Mr. Fall: That is all. [114]

Cross-Examination.

Q. By Mr. Kappler: Immediately after your husband returned from the San Pedro Hospital did he complain of dizziness?

A. Yes, he did, immediately.

Q. After your husband came home from the hospital did he complain of headaches?

A. Yes, he did, and he still complains.

Q. You are the mother-in-law of my client, Mr. Cekalovich? A. Yes, I am.

Q. Did you and your husband live with my client, Mr. Cekalovich and his wife?

A. Yes, we did live together for ten or twelve years.

Q. How much did you pay to Mr. and Mrs. Cekalovich each month for your room and board?

Mr. Fall: To which we object as being improper cross-examination.

The Court: No, it might show the interest of the witness. If the witness has any financial arrangements at all it might go to her interest and bias.

A. Before we used to pay \$65.00 when it was cheaper living. Now we pay \$85.00.

Q. That is for the two of you?

A. Yes, for both.

(Testimony of Carl R. Bishop.)

Mr. Kappler: That is all. [115]

The Court : Do you rest, Mr. Fall?

Mr. Fall: Your Honor, I believe I rest. I don't know of anything more that I have, but I would like to wait until tomorrow morning before resting.

The Court: It is ten minutes to 5:00, and we have had no recess this afternoon. We will now take a recess until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock a. m., Friday, December 17, 1943.) [116]

Los Angeles, California, Friday, December 17, 1943;
10 a. m.

Mr. Kappler: I have a doctor here I would like to put on out of order, may it please the court.

The Court: Very well.

CARL R. BISHOP,

a witness called by and on behalf of the respondents, having been first duly sworn, testified as follows:

The Clerk: What is your full name, Doctor?

A. Carl R. Bishop.

Direct Examination.

Q. By Mr. Kappler: Where did you get your medical education?

A. Los Angeles. I am a graduate of the College of Medical Evangelists.

Q. How long have you been practicing your profession in California? A. Since July of 1924.

(Testimony of Carl R. Bishop.)

Q. Are you on the staff of any hospital?

A. Yes, I am on the staff of all the local hospitals in Long Beach, and on the courtesy staff of the other hospitals in the harbor district.

Q. Are you a member of any medical societies?

A. All of the medical societies, County, State, and National. [117]

Q. What is the general nature of your practice, Doctor?

A. My work is traumatic surgery and general surgery, and some very small amount of general practice.

Q. Did you have occasion to examine Steven Ruljanovich on my behalf?

A. I did, on November 3rd of this year.

Q. Can you state generally the type of examination that you made?

A. The patient came to my office, and I questioned him as to his complaints and his physical condition, to learn about his physical condition. In other words, I obtained a complete personal history, and a history regarding his previous injuries, and following this I did a complete physical examination, beginning with the head and downward to the feet, and supplemented this examination by laboratory work consisting of a complete blood count, urinalysis, blood Wasserman, and I believe that was the extent of it. I took no x-rays at that time.

Q. Did you find, in the course of your physical examination, that this man was suffering from any observable abnormalities of any kind?

A. Yes, my laboratory work demonstrated the presence of a secondary anemia, and the physical findings

(Testimony of Carl R. Bishop.)

demonstrated a very severe condition of pyorrhea of his lower teeth. An examination of the head and vessels indicated the presence of an arteriosclerosis and a generalized thickening [118] of the vessels, which would accompany his age; and hypertensive heart disease.

Q. When you say he was suffering from arteriosclerosis, in lay language that means hardening of the arteries, doesn't it?

A. Hardening of the arteries and thickening of the blood vessels which accompanies age, and which is stimulated and brought about in many instances by infection.

Q. Doctor, as I understand it, it is possible to manually palpate the vessels so as to determine whether or not there is some thickening, is that correct?

A. Yes, in the forearm and upper arm the vessels can be palpated.

Q. Did the man give you a history of his present complaints?

A. Yes, he did. His present complaints consisted of headaches and dizziness and loss of memory; they seem to be his main complaints.

Q. In your opinion, Doctor, are any of those present complaints which this man now has referable to the trauma which this man received on May 4, 1942?

A. No.

Mr. Fall: To which we object at this time, as calling for the conclusion of the witness, without a proper foundation having been laid to determine whether or not he has been informed of the injuries, or what he was informed of. [119]

(Testimony of Carl R. Bishop.)

The Court: I think that goes to the weight of the testimony, counsel. On cross-examination you can clear it up. You may answer.

A. No, I found none of those findings that I mentioned were in any way attributable to trauma.

Q. By Mr. Kappler: Did the patient state to you the nature of the trauma which he received on May 4th?

A. Yes, he did. He recited to me about going to work in the morning, and going into a warehouse to get some sails, when a piece of 4 x 4 timber that was standing on end fell over and struck him on his head. He told me about what happened; about being taken to Dr. Steller's office for first aid; that he was conscious continuously; he remembered what was done for him. He was subsequently taken to the San Pedro General Hospital, which operates as a marine hospital, and was under the doctor's care there approximately a week.

Q. You, of course, were able to observe the exact area on the head where the blow was struck?

A. Yes, he had a well healed scar in the right anterior parietal region of the scalp, between three and four inches in length, and it is freely movable. There are no adhesions, and it is not at the present time tender to touch or pressure.

Q. You have stated that this man is suffering from secondary anemia, Doctor. The evidence which has already [120] been brought out discloses that a blood count was taken at the San Pedro Hospital following the infliction of the trauma, and at that time the blood count revealed 2,800,000 red blood cells, and a hemoglobin

(Testimony of Carl R. Bishop.)

count of 70 percent. Thereafter, I believe on November 3rd, you caused a laboratory examination to be made which revealed that the man had 4,350,000 red blood cells with a hemoglobin count of 78 percent. Evidence introduced yesterday by Dr. Walsworth, of San Pedro, who is now attending this man, revealed that on two occasions, one in December of this year, the other in November of this year, blood counts were done on this man, and in both cases the red blood count was under 400,000 and the hemoglobin count in each case was 76 percent.

Mr. Fall: Counsel, don't you mean under four million?

Mr. Kappler: Yes, under four million, and the hemoglobin count was 76 percent. Does that entire picture, Doctor, indicate anything to you?

A. That indicates, yes, a definite condition of secondary anemia which has been present since the first hospitalization in the San Pedro General Hospital, and with an improvement as far as the cellular count is concerned, and some slight improvement so far as the iron or hemoglobin is concerned, but still there is only 75 percent of hemoglobin present.

Q. Doctor, is the condition of secondary anemia something that is caused by a traumatic injury? [121]

A. It may be. It is an anemia. Anemia means deficiency of blood, and secondary anemia means it is secondary to some cause. There is always a cause of secondary anemia, and, of course, those causes are many. A very important cause is hemorrhage, loss of blood, and probably the next of importance would be infectious processes within the system, and, of course,

(Testimony of Carl R. Bishop.)

another very important cause at this time are dietary deficiencies.

Q. Did this man have any infectious process in his system that would account for the presence of secondary anemia?

A. I think so. The pyorrhea in his lower jaw is extensive and severe. I don't see how the anemia could be cured with that severe infectious process remaining.

Q. From your examination of the man's jaw did it appear to you that the condition of his gums was something which had existed for some period of time?

A. Yes, very prolonged. He has crowns, and he has partial plates; a condition of long standing.

Q. This man referred to dizziness, Doctor. That is one of the complaints he gave you, isn't it?

A. Yes.

Q. Would the fact that he is suffering from secondary anemia have anything to do with these dizzy spells he talks about?

A. Yes, one of the prominent causes of dizziness is [122] the absence of oxygen in the blood, and in the fluid of the brain, and if we have a deficiency in our blood volume, or deficiency in the quality of the blood, we have a condition of cerebral anemia, and the senses of balance are not as well oxynated, because of the requirement of our spleen and liver and bones and muscles for blood; and it is a very common cause of dizziness.

Q. Would the combination of secondary anemia and arteriosclerosis and this infection of the gums, which you characterize as pyorrhea,—would that combination

(Testimony of Carl R. Bishop.)

account, in your opinion, for all of the symptoms which this man now exhibits?

A. In my opinion, yes, sir.

Q. In your opinion is this man now suffering from the effects of a trauma which was sustained on May 4, 1942?

A. In no way whatsoever that I can determine, as a result of my examination.

Mr. Kappler: Nothing further.

Cross-Examination.

Q. By Mr. Fall: How do you account, Doctor, for the fact that he did not suffer from dizziness or headaches before May 4, 1942, and at which time he had a blood count of 2,800,000 and a hemoglobin of 70 percent?

Mr. Kappler: I object to that as being a misstatement of the evidence. He said before May 4, 1942, at which time he had a hemoglobin count of 2,000,000. That hemoglobin [123] count was not taken until after May 4th.

Q. By Mr. Fall: Immediately before May 4th. I think we can assume—

The Court: Was there any examination at all prior to the time of the accident?

Mr. Fall: No, Your Honor. The blood count was taken a very short time afterward, within two or three days.

Mr. Kappler: Within two or three days. The question in its present form is improper.

(Testimony of Carl R. Bishop.)

The Court: The form of it is improper; it should be assumed that on a certain date, and then ask him his opinion.

Q. By Mr. Fall: Doctor, assuming that on about the 6th or 7th day of May he had a blood count of 2,000,000 red corpuscles—2,800,000, with 70 percent hemoglobin, and prior to May 4th he never complained of any headaches or dizziness, how do you account for no complaints, or those things, at that time, or do you?

A. Do you mean on the 6th of May, two days after the accident?

Q. The 6th of May, a couple of days after the accident, he had this blood count taken, and found 2,800,000 with a 70 percent hemoglobin. You do not attribute that condition to the injury, do you?

A. I haven't been asked.

Q. Do you? A. Do I what? [124]

Q. Attribute that low blood count and a 70 percent hemoglobin to the injury he sustained?

A. I don't know. I don't know anything about a blood count prior to the injury. I think we are assuming facts that are not in evidence. I think it would be necessary to know what the blood count was prior to the injury, and after the injury, before anybody could make an opinion.

Q. Then your opinion at the present time is that you can't tell what the present condition of anemia is due to?

A. I have a very clear picture of what has occurred to this man since May 4, 1942, until November 3, 1943, when I saw him, which I think is sufficient to account for such symptoms as he has now.

(Testimony of Carl R. Bishop.)

Q. Why can't you account for that one on May 3rd? Why do you have to put in May 4th?

A. That was the day he was injured. I don't know what his condition was prior to the injury. He may have had dizziness prior to that time. I don't know.

Q. You never received any history of it?

A. I didn't question him about dizziness other than about his blood pressure. I knew he had a blood pressure. I never asked him if he suffered from headaches or dizziness before the accident. I did not go into dizziness. He stated to me that prior to the accident he had worked steadily, and was a healthy man.

Q. Now you attribute the headaches and dizziness to [125] anemia, is that right?

A. I do, yes, sir.

Q. At that time he did not have them, before May 4th?

A. I don't know that he did not have them. He told me he was a healthy man. I never saw the man prior to May 4th.

Q. Doctor, wouldn't that be very material in determining the cause of the headaches and dizziness, to determine whether or not he had them before the accident, when immediately after the accident he has a blood count taken, and it shows a very low count of red corpuscles, and only 70 percent hemoglobin?

A. I knew nothing about that when I made my examination. I know nothing about any tests made of him other than the test I made.

Q. You are very successful in evading my questions, Doctor—

(Testimony of Carl R. Bishop.)

The Court: Counsel, that is not proper.

Q. By Mr. Fall: Wouldn't it be very material, in determining whether the headaches and dizziness were attributable to anemia, to determine whether or not he had them before the accident?

A. If I had any way of determining it, yes.

Q. How do you determine that he had them afterward?

A. That was his complaint at the present time. He voluntarily stated to me his complaints.

Q. Wouldn't you determine whether or not he had them [126] before the accident in the same manner of asking him?

A. I asked him about his physical condition.

Q. You said he had a general condition of hardening of the arteries? I think I understood you to state that, is that correct?

A. Yes, he now has, yes, sir.

Q. Did you check the vessels,—the fundi, or fundus? A. No, I did not.

Q. Those are the vessels that are usually the first ones to indicate a general condition, or a condition of hardening of the arteries, isn't that correct?

A. They show evidence of sclerotic changes early in the presence of arteriosclerosis.

Q. If it were a fact that those vessels are normal at the present time, then would you change your opinion? A. Not at all, sir.

Q. As to whether or not there was a general condition? A. Not at all.

(Testimony of Carl R. Bishop.)

Q. Doctor, you can assume that those vessels are normal at the present time. Now, with that would you say he had a general condition of arteriosclerosis?

Mr. Kappler: There is no testimony in the record that the vessels of the eye are normal at the present time. The only evidence is from Dr. Dickerson's testimony that in January, 1943 the vessels appeared to be normal to him.

The Court: On cross-examination counsel can assume a [127] state of facts. The doctor can answer on a state of facts assumed by counsel in his question, which later he might be able to establish. On that theory I will permit the question.

A. May I hear the question again, please?

(Question read by the reporter.)

A. From my examination I would.

Q. By Mr. Fall: In his general condition you would expect to find the vessels in the eye, the fundus, showing some condition of arteriosclerosis, wouldn't you?

A. Not necessarily.

Q. Did you get a history that the man did suffer concussion of the brain in the injury?

A. Not in those terms, no, sir.

Q. Did you assume that he did sustain a concussion of the brain? A. No, I did not.

Q. What is a concussion, Doctor?

A. Concussion is that condition of the brain and its covering which follows severe blows or injuries in which unconsciousness accompanies the blow.

Q. Doctor, unconsciousness does not have to accompany a blow in order to sustain a concussion, does it?

(Testimony of Carl R. Bishop.)

A. In the true sense of concussion, yes, it does.

Q. You are familiar, of course, with a number of authorities on that point, aren't you? [128]

A. Every man has his opinion, that has seen and treated head injuries.

Q. There are many recognized authorities that hold that concussion can be mild, and it can be severe? Put it this way: In a mild concussion it is not always that you do have a period of unconsciousness, isn't that true?

A. What is your question, please?

The Court: Repeat the question, Mr. Dewing.

(Question read by the reporter.)

A. Which do you want?

Mr. Kappler: That is a compound question, Your Honor.

The Court: I think the doctor can take care of it.

A. He has spoken of two matters. He has spoken about authorities; then he has asked me the question as to whether or not unconsciousness is present. In answer to the latter part of the question first, it is generally understood that concussion, in its true sense, is accompanied by unconsciousness, and there are probably authorities on the subject regarding concussion. I have no recollection of any authorities that I have read recently that I can quote at this time stating that unconsciousness is not necessary.

Q. By Mr. Fall: Have you read anything by Sidney W. Gross? A. No, I have not.

Q. Are you acquainted with H. Biesen, on Gross psychological principles to head injuries? [129]

A. I never heard of him.

(Testimony of Carl R. Bishop.)

Q. Are you familiar with C. B. Corvill and C. A. Blumquest on Traumatic Cerebral Hemorrhage?

A. I am familiar with Corvill.

Q. Isn't it a fact that Corvill is of the opinion that unconsciousness does not necessarily follow a concussion?

A. I never asked him.

Q. Doctor, in making blood counts you will find variations due to different laboratory technicians, in their count, taking a blood count maybe one day, and the next day, and even the same, on different technicians, it might give a margin, even up to three or four hundred thousands difference in their actual count?

A. Do you want my answer to that?

Q. Yes. A. No, not the average technician.

Q. You do actually find it, though, don't you—find variation?

A. If you find it in hospitals it is not the same technician that does the count. So far as the hemoglobin is concerned, the method of evaluating the hemoglobin now, it is very accurate. Practically all laboratories and hospitals use colorimeters.

Q. I understand with a colorimeter you can be very consistent, because of the present method, by counting the corpuscles, but you will get a variation because of the [130] different technicians?

A. The different technicians, some should have their counts within fifty to one hundred thousand day after day.

Q. Doctor, after an injury to the head, you might call it a severe jarring, or, as Dr. Dickerson calls it, *commotio cerebri*—after a severe jarring of the head,

(Testimony of Carl R. Bishop.)

you would expect to find in a man of the age of Mr. Ruljanovich certain symptoms of dizziness and headaches, wouldn't you?

A. Yes, for a period of time.

Q. And often those things even get worse when the man returns to his work, isn't that correct?

A. That is, if he returns immediately. No, injuries of that nature recover quite promptly.

Q. Headache is a very common symptom after a severe jarring of the head, isn't it?

A. It is a subjective symptom.

Q. It is, of course, a subjective symptom, but it is a common symptom, isn't it?

A. A common subjective symptom, yes, sir.

Q. And a very common symptom is dizziness after the severe jarring of the head?

A. That is correct.

Q. Yet you are of the opinion that those conditions in Mr. Ruljanovich are not connected with the accident?

A. Eighteen months after the accident?

Q. Yes. [131]

A. Absolutely no connection at this time.

Q. Three months after the accident?

A. I did not see him at that time.

Q. Would you say within three months after the accident these complaints of his were not attributable to the accident?

Mr. Kappler: I don't think that is fair cross examination, unless counsel furnishes the doctor some more facts on which he can base his opinion. He hasn't anything indicated to him as to what the man's com-

(Testimony of Carl R. Bishop.)

plaints were three months from the accident, and what he was doing by way of activity, and what medication he was receiving.

Mr. Fall: If the doctor didn't get that information I don't think he is qualified to testify as to what he thinks they are caused from now. Maybe I should ask a preliminary question. I will withdraw that question.

Q. You did get a history from him of headache and dizziness from the time of the accident up to the present time? A. I did.

Q. In your opinion were the headaches and dizziness he complained of some three months after the accident attributable to the accident?

A. From the history that he gave me, and the extent of his injury, the length of time that he was in the hospital, his ability to be up and around after he left the hospital, it would be my opinion that three months would be [132] the upper limit of time for those symptoms to persist.

Q. After an injury of the nature sustained by Mr. Ruljanovich on May 4, 1942, you would expect a post-traumatic vasomotor instability, wouldn't you?

A. Yes, that condition very often follows injuries such as he sustained.

Q. You do find that he does have a vasomotor instability at the present time, don't you?

A. No, as far as my examination was concerned I find no evidence of vasomotor instability. The patient, however, told me that he took medication continuously for his blood pressure and for his vessels, and he re-

(Testimony of Carl R. Bishop.)

cited to me the doctors that he had been under continuously, which would indicate that it was necessary for him to be under supervision and treatment to keep his condition stabilized.

Mr. Fall: I have no further questions.

Redirect Examination.

Q. By Mr. Kappler: Doctor, this man was injured on May 4, 1942, and did not return to work until the middle of July of 1943. Now, do you have any opinion, based upon the examination which you made, and upon the history which you received, as to whether or not this man was fully recovered from the effects of the trauma which he received, by the middle of July of this year?

A. It is my opinion that he was fully recovered then, and had been before that. [133]

Q. The evidence will show that commencing in the middle of July and ending with the week of July 24, this man worked 40 hours in a cannery, and that ending the following week of July 31st he again worked 40 hours in a cannery, and the following week, August 7th, he put in 49 hours in the cannery, and the week of August 14th he put in 40 hours and 40 minutes; the week of August 28th, 45 hours 30 minutes; the week of September 4th, he put in 50 hours; the week of September 11th he put in 39 hours; the week of September 18th, he put in 44 hours; the week of September 25 he put in 37 hours; the week of October 2nd, he put 58 hours and 45 minutes; the week of October 9th, 74 hours and 15 minutes; October 16th, 74 hours and 45 minutes; October 23, 41 hours and 30 minutes; Octo-

(Testimony of Carl R. Bishop.)

ber 30th, 38 hours and 30 minutes. The evidence shows, Doctor, that the type of work he was doing was tailing cans, that is, taking the cans off of a conveyor belt of some sort, and placing them in a box. In your opinion, after reviewing the number of hours that this man worked, commencing with the week ending July 24th, and ending with the week of October 30th, would you say that the man was doing a pretty good day's work for a man of his age?

A. I would think he was certainly doing—putting in the average number of hours and over. There is overtime there as to a number of those weeks. It would seem like normal time—normal labor activity. [134]

Mr. Kappler: I think that is all.

Mr. Fall: I have no further questions.

DINKA CEKALOVICH,

a witness called by and on behalf of the libelant, having been first duly sworn, testified as follows:

Direct Examination.

Q. By Mr. Fall: Mrs. Cekalovich, were you with your father, Mr. Ruljanovich, when the changes were made in the deposition? A. Yes, I was.

Q. Before they were made did you receive a copy of the deposition?

A. Yes, you gave it to my father and me at your office.

Q. Then what did you do with it?

A. I took it home and read it to my father, and explained to him in our language his answers. He was surprised that he made so many mistakes.

(Testimony of Dinka Cekalovich.)

Mr. Kappler: I move to strike that.

The Court: It may go out.

Q. By Mr. Fall: That may go out. And then, did you make any changes?

A. He told me to put marks in each question where he tells me it was wrong; then when we went the next day to your office, and you asked him the same questions as I was explaining to him in our language, he was telling me what to [135] say in English, and I was writing it too.

Q. At that time the changes were made in the deposition?

A. Yes.

Q. Did he initial the changes at that time?

A. Yes, he initialed every one.

Q. Do you know how your father happened to go to Dr. Walsworth?

A. When he was at your office—

Mr. Kappler: I object to that as immaterial.

Mr. Fall: Counsel brought it out on cross-examination, that Dr. Walsworth was referred to him by David A. Fall. I think it bears a little explanation, as long as he brought it out.

The Court: Answer the question if you can.

A. When we were at your office, you told me that you had an accident, and I asked you who was taking care of you, what doctor, and you told me the name of this doctor. Then I said to my father about him, that I heard he was a very good doctor, and I heard other people too; my singing teacher told me my father should go to this kind of doctor. So when I came to you the next day I asked you his telephone and his name, and

(Testimony of Dinka Cekalovich.)

please to call the doctor and get an appointment for my father. You told me to go to him if you are satisfied, just to have an examination.

Q. By Mr. Fall: Your father went to see Dr. Walsworth? [136]

A. Yes, he did.

Mr. Fall: That is all.

Cross-Examination.

Q. By Mr. Kappler: Is it your testimony, Mrs. Cekalovich, that your father did not understand the questions in the deposition?

A. No, he didn't, because he was asked so many times, and he couldn't answer. It took him sometimes five or six times. You remember, don't you?

Q. I didn't think he had any trouble with it.

A. He had very many.

Q. Was it because the questions were complicated?

A. It was not. He doesn't understand. Very often, lots of times, he doesn't understand every word.

Q. You heard him testify in the courtroom yesterday, didn't you?

A. Yes, I did.

Q. He didn't have any difficulty in here, did he?

A. I think he did some; but at that time you asked him lots of times, ten times, until he was able to understand.

Mr. Kappler: That is all.

Mr. Fall: I would like to call Mr. Ruljanovich and ask him two or three questions if I may. [137]

STEVE RULJANOVICH,

recalled.

Direct Examination continued.

Q. By Mr. Fall: Mr. Ruljanovich, when was the first time that you saw Dr. Dickerson's report?

A. I saw him around; I remember around July—no, June. I don't remember.

Q. Where was it that you first saw the report?

Mr. Kappler: That is objected to as irrelevant and immaterial. A. The first time—

The Court: Wait a minute.

Mr. Kappler: I don't see what bearing it could possibly have on the case. The doctor has testified fully. The report is not in evidence. It is a question concerning a document which is not in evidence.

Mr. Fall: I want to show, and I think I should be entitled to show, that I have had to go into the defendant's camp to get the medical over a certain period of time. I think it bears a little explanation, as to why this man has to do that.

The Court: Haven't you developed all the facts, counsel?

Mr. Fall: No, Your Honor. There is a very serious one, I do want to develop.

The Court: If he knows about some other fact you can develop it. He has already produced medical testimony of his own. He has produced his doctor. [138]

Mr. Fall: Yes, Dr. Walsworth, but I mean over this earlier period of time.

The Court: If there is any fact that has not been developed, of course I will permit you to develop it,

(Testimony of Steve Ruljanovich.)

with reference to the doctors, his treatment, or anything else.

Mr. Fall: Maybe counsel will stipulate that at the hearing before the Industrial Accident Commission the defendants produced this report of Dr. Dickerson at that time, and that was the first time that Mr. Ruljanovich had received a report from Dr. Dickerson.

Mr. Kappler: I was not there, your Honor. I couldn't say. I did not represent the Occidental Indemnity Company before the Industrial Accident Commission.

Mr. Fall: You will stipulate, won't you, that the Occidental Indemnity Company, at the hearing before the Industrial Accident Commission, offered this report of Dr. Dickerson in evidence? I think a certified copy of the proceedings shows that.

Mr. Kappler: I will stipulate this, your Honor: That Mr. Roberts, the man who was on the stand yesterday, was, in August, 1942, the attorney representing Mr. Ruljanovich in a civil action directed against the Crescent Wharf and Warehouse Company, which action was filed in the Superior Court in Long Beach, and that in connection with the preparation of that action for trial Mr. Roberts referred this man to Dr. Dickerson, and that at that time Mr. Roberts [139] was representing Mr. Ruljanovich in the plaintiff's case. I will stipulate further that thereafter Mr. Roberts was substituted out of the case, and that Mr. Fall took over the entire proceeding. Maybe that will help you.

Mr. Fall: I will accept the stipulation.

The Court: Stipulation accepted.

(Testimony of Peter Cekalovich.)

Mr. Fall: Will you further stipulate that it was when this action was filed in admiralty on the claim against the Occidental Indemnity Company, before the Industrial Accident Commission, was when there was a substitution of attorneys in the case of Ruljanovich vs. The Crescent Wharf and Warehouse Company?

Mr. Kappler: No, because I have no knowledge of that. I do know that Mr. Roberts was substituted out of that, and you were substituted in, but I do not know when it was.

Mr. Fall: I think I have no further questions. I will call Mr. Cekalovich.

PETER CEKALOVICH,

called as a witness by and on behalf of the libellant, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Fall: Mr. Cekalovich, you went to the emergency hospital, or drove to the emergency hospital, when you took Mr. Ruljanovich? A. I did. [140]

Q. After the accident? A. Yes, sir.

Q. Did you see him immediately after, or right after he was hit by this timber? A. Yes.

Q. Did you talk with him? A. No.

Q. Did he talk at all?

The Court: I think that was all covered by this witness. He said he was standing outside about a foot or two away. You showed him the map as to where he was standing..

(Testimony of Peter Cekalovich.)

Mr. Fall: I don't know whether he went into whether the man was knocked unconscious.

The Court: Yes, you went into all of that. Is that your recollection?

Mr. Kappler: Yes.

The Court: He stated fully, and that he was crying when he talked to him. You remember that?

Mr. Fall: I thought that came from another witness.

The Court: Wasn't that your testimony?

A. No, that was from Mr. Zica.

The Court: All right, go ahead.

Q. By Mr. Fall: Did you ask him any question?

A. I did not ask him any question, because I was trying to get in touch with the emergency hospital, to go, because I thought it was the emergency hospital there from [141] the island, but then I found out it was not, so I tried to call up an ambulance.

Q. So you don't know whether he was conscious or unconscious?

A. While I was there just a second I know he was lying down and saying nothing, but when I started to my car, to go over there to reach the ambulance.

Mr. Fall: I have no further questions.

Mr. Kappler: No questions.

Mr. Fall: The libelant rests.

Mr. Kappler: Call Mr. Christian.

Mr. Fall: Is this from the French Sardine?

Mr. Kappler: I think we can stipulate. I read some figures, your Honor, which I obtained from Mr. Chris-

(Testimony of Peter Cekalovich.)

tian, who is the accountant at the French Sardine Company, which indicated the number of hours that Mr. Ruljanovich worked, commencing with the period when he went back to work in July, 1943, and I have the figures for each week ending with the week of July 29th. I think we can stipulate probably as to the number of hours which he worked.

The Court: What is Mr. Christian's first name?

The Witness: Winter W. Christian.

Mr. Fall: Yes, we will stipulate that if he was called he would testify that his record shows these hours and the wages that were paid to Mr. Ruljanovich.

The Court: Put them in the record. [142]

Mr. Kappler: The week ending July 24, 40 hours; wages \$36.05;

Week ending July 31, 40 hours 15 minutes—have you got those, Mr. Christian?

Mr. Christian: Yes.

Mr. Kappler: I think probably it would be better to have him testify.

The Court: Swear Mr. Christian.

WINTER W. CHRISTIAN,

called as a witness by and on behalf of the respondents, having been first duly sworn, testified as follows: .

Direct Examination

Q. By Mr. Kappler: What is your full name, Mr. Christian? A. Winter W. Christian.

Q. This is the payroll record of the French Sardine Company, on Steve Ruljanovich, for the week ending July 29, 1943?

A. 40 hours. Gross earnings, \$36.05.

(Testimony of Winter W. Christian.)

Q. The week of July 31st?

A. 40 hours 15 minutes, \$36.22.

Q. The week of August 7th?

A. 49 hours, \$48.15.

Q. August 14?

A. 46 hours 30 minutes, \$44.77.

Q. August 21? [143] A. 42 hours, \$38.70.

Q. August 28?

A. 45 hours 30 minutes, \$43.42.

Q. The week of September 4th?

A. 50 hours, \$49.50.

Q. September 11?

A. 39 hours 30 minutes, \$36.22. This is some additional pay on account of the wage and hour adjustment.

Q. The week of September 17th he did not work?

A. No.

Q. The next week following the 11th would be September 18.

A. 44 hours 30 minutes, \$42.07.

Q. The week of September 25?

A. 37 hours 45 minutes, \$33.97. If you want the total, that's 435 hours. That's the end of a quarter.

Q. The next weekly period, October 2nd?

A. 58 hours 45 minutes, \$61.31.

Q. The next week is October 9th.

A. 74 hours 15 minutes, \$75.95.

Q. October 16? A. 47 hours, \$45.45.

Q. October 23?

A. 41 hours 30 minutes, \$37.80.

Q. October 30th?

A. 38 hours 30 minutes, \$35.15. [144]

(Testimony of Winter W. Christian.)

Q. That is October. The time is 260 hours.

A. That is all the time in '43.

Q. He didn't work after that?

A. No, sir. The record does not show it.

Q. In other words, from the week ending with July 24, 1943, until the week ending with October 30th, 1943, when he last worked for your company. Mr. Christian, Mr. Ruljanovich worked no less, on any occasion, than 37 hours in one week, isn't that correct?

A. That's right.

The Court: That is in the record.

Q. By Mr. Kappler: As I understand it, you are not restricted down at the French Sardine Company by the 40 hour week?

A. No, sir.

Q. I notice in one week, in October, he worked 74 hours.

A. That's right.

Q. Do you know, Mr. Christian, the type of work that is done down there when they refer to it as tailing cans?

A. Yes.

Q. Describe to the court what that is generally.

A. The cans of canned fish, after the fish is canned, are put into a large retort basket, and run into a retort, that is of a certain temperature and pressure, for a certain length of time, in accordance with the requirement of the State Health Department. Then another large basket, [145] containing, I guess, four or five hundred cans of the fish, is taken from the retort, the chambers in which they are steamed. They are then trucked back into the warehouse, and from there are taken out, and some classes of them are put directly into the cases in which they are stacked; some of them may

(Testimony of Winter W. Christian.)

be loaded right onto the conveyor, into the labeling machine.

Q. Does that work require any bending at all?

A. When you start, the retort baskets I guess will stand probably three and a half—I guess three and a half or four feet high, and when you first start unloading off the top basket, it will require no stooping, but as the basket empties out the man would have to bend over to get them out of the basket, either onto the conveyor belt, or put them in cases.

Q. I notice there is some difference in the number of hours worked each week. Is that explained by the amount of fish present in the cannery?

A. Probably. I haven't looked into that record to see why, but it could be. That was all the time required for the workers, on account of probably the light receipts of fish, and consequently the light run in the can processing. Sometimes we have heavy runs of it, which will require more time, or probably, if they had some rush orders, it would have required them to work more hours than others.

Mr. Kappler: That is all. [146]

Cross Examination

Q. By Mr. Fall: Mr. Christian, Mr. Ruljanovich didn't work after that last day in October?

A. That is the last record we have, the week ending October 30th.

Q. He didn't work after that? The record shows he didn't work after that?

A. That's right.

Mr. Fall: That is all.

NICK KARUZA,

a witness called by and on behalf of the respondents,
having been first duly sworn, testified as follows:

The Clerk: State your full name?

A. Nick Karuza.

Direct Examination

Q. By Mr. Kappler: Mr. Karuza, what is your occupation? A. Fisherman.

Q. On May 4, 1942, did you accompany Mr. Ruljanovich and the other seamen over to the Crescent Warehouse Company?

A. Yes, I was in the crew. We were together.

Q. Did you go over in a truck?

A. I went with the truck, small truck.

Q. By the time you got there had the door already been opened? A. Not yet. I was waiting. [147]

Q. Did you go around to the inside of the building, or did you enter the door from the outside?

A. Do you mean when he opened the door?

Q. Yes. A. We was waiting until he opened.

Q. You were outside waiting for the door to be opened? A. Yes.

Q. Where were you standing at the very moment that this timber struck Mr. Ruljanovich?

A. I was inside, close to him.

Q. How close to him?

A. About a foot from each other. I was close to him, standing up.

Q. Did the timber come close to you?

A. It missed me, and hit him.

(Testimony of Nick Karuza.)

Q. You saw the man who testified in court here yesterday, Mr. Gibson? A. Yes.

Q. Do you know who he is?

A. Yes. Not before, but yesterday, when he was here.

Q. You knew he was not part of the crew, anyway?

A. No, he was foreman of the warehouse.

Q. He was foreman of the Crescent Warehouse Company? A. Yes.

Q. Did you observe Mr. Gibson get up on the truck? A. Yes, I saw him. [148]

Q. At that time, would you tell me where Mr. Muljat was?

A. He first jumped, Mr. Gibson; then Mr. Muljat followed right away in the same truck after him.

Q. You mean by that that Mr. Gibson jumped up on the body of the truck, and Mr. Muljat followed him immediately? A. Yes.

Q. Did you observe the spot on the dock where Mr. Gibson jumped from? A. Yes, from here.

Q. You are referring to Respondents' Exhibit D, will you put the spot that Mr. Gibson jumped from, point it out? A. Here, close to the corner.

Mr. Kappler: May I mark that K-1, your Honor?

The Court: Yes.

Q. By Mr. Kappler: How did he get up onto the truck?

A. When he jumped he touched the corner with his hand.

Q. He touched the corner with his left hand?

A. His left hand, yes, when he jumped.

(Testimony of Nick Karuza.)

Q. How did Mr. Muljat get up onto the body of the truck?

A. The same thing, both; he followed him.

Q. The same thing Mr. Gibson did? A. Yes.

Q. The net was stacked up on this deck over here?

A. Yes.

Q. How far was it from the place where you have placed [149] this X over to the nearest portion of the net? A. A couple of feet.

Q. At least a couple of feet? A. Yes.

Q. How long was it after Mr. Gibson had gotten up onto the truck that the timber fell?

A. The timber fell—he first jumped, Mr. Gibson—he went, walked to where the driver stayed—what you call it?

Q. The cab?

A. The cab. Then Mr. Muljat followed him. Then the timber come at once. Nobody see how it come down.

Mr. Fall: I ask that that part of the answer "nobody see how it come down" be stricken.

The Court: That may go out.

Mr. Kappler: Yes.

Q. Did you hear Mr. Gibson shout any cry or warning to anyone? A. Crying?

Q. Did Mr. Gibson give a warning, "Look out," or something like that?

A. No, sir, he didn't say a word. Two policemen come there, and they examine how that come down, the timber. I pick the timber, and I put it back, and then

(Testimony of Nick Karuza.)

he said to the police, he said, "Look out." Then I told him, "Excuse me, you lie—" [150]

Mr. Fall: To which we object at this time.

Mr. Kappler: That may go out; any conversation he had after that.

The Court: It may go out.

Q. By Mr. Kappler: Mr. Karuza, you observe the standard here upon which the flag is raised?

A. Yes, sir.

Q. How much higher than that standard would you say that this timber was?

A. I believe it is at least four feet higher than that.

Q. Would you say the top of the timber would have come pretty close to the ceiling in this courtroom?

A. Four feet higher. It was between 16 and 18 feet high, that timber was.

Q. Did Mr. Gibson warn you, or any of the other fishermen there, of the presence of this timber, prior to the time that you started working around the net?

A. No, he didn't say a word.

Mr. Kappler: That is all.

Cross Examination

Q. By Mr. Fall: Mr. Karuza, did you help pick up Mr. Ruljanovich?

A. Yes, I was first to him when the timber come down; I picked him right away I saw him knocked down; I see the crack over his head, and blood rush all over his head, and I have the handkerchief and I close his wounds, and the [151] blood was around the place,

(Testimony of Nick Karuza.)

and I lifted him, and of course somebody else helped me to lift the man up. Then two or three guys come up to help me.

Q. Was he knocked unconscious?

Mr. Kappler: Just a minute. That is a conclusion. Develop the facts.

Q. By Mr. Fall: Did you say anything to him?

A. To who?

Q. Mr. Ruljanovich.

A. No, when he was knocked down I lifted him. Then I called for some more help. I help pull him to the center of the wharf.

Q. Did he talk then?

A. Nothing right away. Then he say, "Mother, it killed me." Those were the only words.

Q. After that did he say anything at all?

A. No, he didn't say nothing any more.

Q. Did you ride to the emergency hospital with him?

A. No; I helped put him in the car.

Q. Did he say anything at all, from the time that you just mentioned, that he made that remark, until you got him in the car?

A. No, he don't say a word. He couldn't say a word any more. We have drag him to the center, and until the car come to take him.

Q. Did you try and talk with him after that, that is, [152] during that period of time? A. No.

Q. You carried him out to the automobile?

A. Yes.

Q. Did you try and talk with him?

(Testimony of Nick Karuza.)

A. No, because we pick him, and put him right away in the car, and these boys take him to the doctor's office.

Q. Was he bleeding very badly?

A. I take I think a twelve-inch handkerchief, and cover his head, and it soak through all at once, like you put it in the water.

Mr. Fall: No further questions.

Mr. Kappler: That is all.

FRANK N. MULJAT,

called as a witness by and on behalf of the respondents, having been first duly sworn, testified as follows:

The Clerk: What is your full name?

A. Frank N. Muljat.

Direct Examination

Q. By Mr. Kappler: You are one of the owners of the "Betsy Ross"? A. Yes.

Q. What relationship, if any, do you have with the Crescent Wharf and Warehouse Company, a corporation?

Mr. Fall: To which we object as being incompetent, [153] irrelevant and immaterial, and not tending to prove or disprove any issue before the court.

The Court: I suppose it is preliminary, counsel.

Mr. Fall: I will withdraw the objection.

The Court: Proceed.

A. I don't have no relation whatsoever. Just I have stored net there.

(Testimony of Frank N. Muljat.)

Q. By Mr. Kappler: You store your net?

A. Yes.

Q. You pay them a certain amount of money for the privilege of storing your net there?

A. Yes.

Mr. Fall: We stipulate he did.

Q. By Mr. Kappler: Can you tell me the approximate date that you stored your net there prior to May 4, 1942, the approximate month?

A. I guess it would be in March.

Q. In other words, you stored your net there in March, and you went to pick it up on May 4, is that right?

A. That is right.

Q. You had not been over to the Crescent Warehouse Company between March and May 4, had you?

A. No.

Q. Did you go through the warehouse to get inside of it, or did you wait outside until the door was opened?

A. I don't recall. I think I was on the outside [154] waiting for the door to open.

Q. As soon as the door was opened did you walk into the building, when the truck was being backed into the building?

A. I walk in before the truck.

Q. You walked in before the truck?

A. Yes.

Q. How soon afterward was the truck backed in?

A. It started to back in right away.

Q. In other words, you walked in, and the truck backed right in?

A. Yes.

Q. Do you know how you got up on the truck?

(Testimony of Frank N. Muljat.)

A. Well, all I can state is when the captain of the boat says for somebody to direct the truck in—the first time the truck came in, the truck is too far away from the deck where the net was, and it would be hard for us to put the net on the truck, so he backed in again. I guess it was twice; both times it was he was too far out. Once he hit the side of the building. So he says “Somebody direct him in.” I jumped on the truck. I don’t recall whether I place my hand against the wall or not. If I did, I didn’t see any timber there; and I just jumped on the truck.

Q. It wasn’t much of a jump from the edge of the dock to the bed of the truck, was it?

A. I don’t know how high myself; I just guessing, two [155] or three feet to the truck. I must have jumped about a foot, I guess.

Q. State how high the net was stacked.

A. Naturally, when you stack a net, you can’t stack it square, like a box, or anything like that. You always stack your net backward, so it won’t be too much in front of you. Say the net is here, you pull the net, and it would be stacked more on a slant. It can’t be square.

Q. The net would be stacked so the base of it would be wider than the top of it? A. Naturally.

Q. How far away would you say that the edge of the net was from the edge of the dock?

A. At the bottom it was probably maybe a foot and a half, but then up higher it would be two or three feet, I guess.

Q. Let me ask you this: If a man stood on the concrete edge of the dock, could he have reached over

(Testimony of Frank N. Muljat.)

from the point designated F-1 and touch any portion of the net at a distance of four feet, or level with his shoulder, four or five feet?

A. I don't think so myself. He might be able to reach it with his hand; that is about all. I doubt if he could even reach it.

Mr. Kappler: That is all. [156]

Cross Examination

Q. By Mr. Fall: Mr. Muljat, after this accident happened there was a conversation about how this timber came down, wasn't there?

Mr. Kappler: I object to that as improper cross examination. I did not go into that subject matter at all.

The Court: Unless it was some admission.

Mr. Fall: I intend to show an admission, your Honor.

The Court: Of one of the parties? If it is an admission on the part of the parties it is admissible.

Mr. Fall: There was a conversation shortly after the accident, wasn't there, with reference to—

The Court: A conversation with whom?

Mr. Kappler: I object unless he lays the foundation.

The Court: With whom?

Mr. Fall: There was a conversation between yourself and some of the other members of the crew, shortly after the accident, as to how the timber came down.

A. What do you mean by shortly after?

Q. Within three or four minutes? A. No.

(Testimony of Frank N. Muljat.)

Q. Isn't it a fact, Mr. Muljat, that within a few minutes after the accident you made a statement that you had pushed or pulled the timber when you got on the truck, and that caused it come down?

Mr. Kappler: I object, unless he lays the foundation to [157] show who was present.

Mr. Fall: I will.

Q. Mr. Karuza was present, and the other members of the crew that went over there that morning, except the ones that took Mr. Ruljanovich over to the doctor's office?

A. I was one of the fellows that took him.

Q. Then the conversation took place before you left, and isn't it a fact that all the members of the crew were present, and you made a statement in substance that you had caused the plank to fall?

A. I don't recall making a statement there. Let's see. I did say something like this, though—it wasn't there within three or four minutes, like you say; that is wrong.

Q. When was it?

A. I did at one time. I don't recall when, in the excitement, I guess it was in the car, when I jumped on the truck, I didn't see anybody else on the truck, and figuring, as I thought—I don't recall putting my hand against the wall, but since I got on the truck I thought maybe that would be the only reason the thing fall, and I did say maybe it was my fault the plank fall, I thought. That was all I said.

Mr. Fall: No further cross examination.

(Testimony of Frank N. Muljat.)

Redirect Examination

Q. By Mr. Kappler: You don't recall, however, that you ever touched any timber, do you? [158]

A. No, I didn't even see it there. I didn't see the timber; nothing.

Q. As a matter of fact, you don't even know whether you touched the timber, do you?

A. No, I don't.

Mr. Fall: To which we object as being leading and suggestive.

The Court: He stated before. It is just a repetition.

Mr. Kappler: That is all.

The only other thing I have, your Honor, is this: I would like to read the deposition of Steve Ruljanovich.

The Court: If it is merely a repetition, why do you think it necessary?

Mr. Kappler. I don't think it is a repetition, because I expressly refrained from covering most of the material contained in the deposition, when Mr. Ruljanovich was on the stand, because it is in here.

Mr. Fall: I think that is true, your Honor. I think it should be read in, because certain objections will be made to certain questions, and we can save the objection to that time.

Mr. Kappler: I also want to object, your Honor, to the changes, of course, that were made at that time.

Mr. Fall: Do you want to read the questions, and I will read the answers?

The Court: Yes, that will keep it straight for the [159] reporter.

(The deposition of

STEVE RULJANOVICH

was here read as follows:)

“Direct Examination

By Mr. Kappler: Let the record show that Mrs. Dinka Cekalovich is present.

“Q—Mr. Ruljanovich, I am going to speak as clearly as I can, and if there are any questions that you do not understand, I want you to tell me so, because I want your testimony here this morning, and not the testimony of Mrs. Cekalovich or anybody else. Is that clear to you?

“A—Yes.

“Q—You will have to answer out loud, so that the reporter can get your answers. Don’t nod your head to say yes or no, speak whatever the answer may be. You understand that?

“A—Yes.

“Q—Are you employed at the present time?

“A—Yes.

“Q—Where are you working at the present time?

“A—We work a little bit on the boats.

“Q—Mr. Ruljanovich, are you working now?

“A—Oh, working now in French Sardines.

“Q—You are working now at the French Sardine, over on Terminal Island?

“A—Yes, sir. [160]

“Q—How long have you been working at the French Sardine Company, prior to the present time?

“A—Three months.

(Deposition of Steve Ruljanovich.)

"Q—You have been working over there for three months?

"A—Yes.

"Q—When did you go back to work, do you recall the date?

"A—Started work in 19th of July.

"Q—Of 1943? I don't want you to turn to Mrs. Cekalovich for your answer. I want you to answer.

"A—19th of July.

"Q—19th of July, 1943?

"A—Yes.

"Q—Was that the first work that you had done since the 4th day of May, 1942?

"A—Yes.

"Q—So between the 4th of May, 1943, and the 19th of —"

Mr. Kappler: It should be the 4th day of May, 1942.

"Q—So between the 4th day of May, 1942, and the 19th day of July, of this year, you haven't worked for anyone?

"A—No.

"Q—On the 4th day of May, the day that you were injured, will you tell me just exactly what happened to you, when you were hit by this timber?

"A—Well, I'd been sitting in the warehouse on the wharf of cement— [161]

"Q—Just a moment. I want to know what happened to you after you were hit. I don't care about what happened before. After you got hit, what happened to you?

"A—Afterward I fell down, when it hit me.

(Deposition of Steve Ruljanovich.)

"Q—All right, did you pick yourself up?

"A—No, that other fellow. I was like dreaming. I understand, but not exactly everything.

"Q—In other words, you were not completely out, but you were sort of hazy, is that it?

"A—I was.

"Q—Did you know, however, that things were going on around you?

"A—Sure.

"Q—You realized that some of the men were trying to pick you up?

"A—Yes.

"Q—Did they pick you up?

"A—They picked me up.

"Q—Where did they take you?

"A—In a machine.

"Q—Where did they take you in the machine?

"A—The machine take me to Wilmington to make me stitches in my head.

"Q—Do you know where they took you in Wilmington? Did they take you to a doctor?

"A—To a doctor. [162]

"Q—Who took you?

"A—Pete Cekalovich and Muljat and Zipko, Joe Zipko.

"Mr. Kappler: I move to strike the answer, as not responsive. Do you know where they took you, the name of the doctor, or the name of the place you went to?

"A—I went to Dr. Steller.

"Q—Someone at Dr. Steller's office looked at you?

"A—Yes.

(Deposition of Steve Ruljanovich.)

"Q—Do you know which doctor it was?

"A—Well, I don't know just his name. He make the stitches at Steller's orders.

"Q—One of the doctors?

"A—One of the doctors, yes.

"Q—At that time, were you able to walk in from the car to the doctor's office?

"A—No. They carry me."

Mr. Kappler: That is changed from "Well, I walking, but just like—Pete take me."

"A—No. They carry me. Pete Cekalovich, because I couldn't walk by myself.

"Q—In other words, they helped you in, but you were on your feet, weren't you?

"A—No."

Mr. Kappler: It was changed from "Oh, yes, I was on my feet, but I go alone I fall down."

"Mr. Kappler: What I am trying to find out, Mr. [163] Ruljanovich, is simply this: You left the car and you had your feet on the ground, but Mr. Cekalovich was assisting you in getting in, isn't that right?

"A—No."

Mr. Kappler: The answer was changed. It was previously "Yes."

"Q—He didn't take you under his arm, or put you on a stretcher, and take you in that way, did he?

"A—I don't know."

Mr. Kappler: The answer was "No." The answer now is "I don't know."

"Q—When you got in there, the doctor took some stitches, where?

"A—Stitches, and sent me to a hospital.

(Deposition of Steve Ruljanovich.)

"Q—They didn't stitch you there in Dr. Steller's office?

"A—No, no.

"Q—What did they do at Dr. Steller's office?

"A—Steller's office, he make my stitches, but after that he sent me to hospital.

"Q—He didn't take the stitches at the hospital?

"A—No, sir, he took them, another fellow took them.

"Mr. Fall: Listen to the questions, and if you don't understand it, don't answer it.

"(Discussion off the record)

"Mr. Kappler: In order to clarify what you have just [164] said, Mr. Ruljanovich, it is true, isn't it, that at Dr. Steller's office they took some stitches in your head?

"A—Yes.

"Q—Did they do anything else for you at Dr. Steller's office?

"A—No, we didn't do nothing.

"Q—Did they take any X-ray pictures of you?

"A—Oh yes, they took X-ray pictures before to make my stitches.

"Q—Do you know what part of your body they X-rayed?

"A—They X-ray, he took me—you know how they take X-rays? I don't know.

"Q—You don't know?

"A—No, I don't know.

"Q—Where did you hurt when you went into Dr. Steller's office? Where did you have pain?

"A—I had pain in my head.

(Deposition of Steve Ruljanovich.)

"Q—Anywhere else?

"A—At the time I didn't feel it, but after a couple of weeks, I did.

"Q—Stick to the question. At that time, at the time you went to Dr. Steller's office, did you have pain only in your head?

"A—Sure.

"Q—Did you have any marks on your body anywhere that you could see? [165]

"A—No.

"Q—Did you, yourself look at this mark, if any, that was on your head? Could you see anything on your head?

"A—No.

"Q—Was it bleeding?

"A—Oh, it was bleeding, yes, bleeding, sure.

"Q—Did you look at it in a mirror?

"A—No.

"Q—Did Dr. Steller bandage up your head?

"A—Sure.

"Q—From there you went where?

"A—San Pedro."

Mr. Kappler: The answer now is "San Pedro." It was "Seaside."

"Q—Or San Pedro?

"A—San Pedro.

"Q—Whom did you see in the San Pedro hospital?

"A—In San Pedro, they take me to hospital on 7th Street.

"Q—Do you know the name of the hospital?

"A—I do, 7th Street.

(Deposition of Steve Ruljanovich.)

"Q—San Pedro Hospital?

"A—San Pedro Hospital, yes.

"Q—That is on the same day?

"A—Same day, yes.

"Q—What did they do for you there? [166]

"A—They put me in the bed, put me to bed, and they took pictures and took care of me, Dr. Petrich.

"Q—How long did you stay at the San Pedro Hospital?

"A—One week.

"Q—During that one week, was Dr. Petrich the man who took care of you all the time?

"A—Yes, he took care of me. I was a couple of times right here in his office, in the Post Office, where he got office.

"Q—I mean, during that one week, you were in the hospital all the time, weren't you?

"A—Yes.

"Q—You didn't leave?

"A—No, no.

"Q—During that one week period, did Dr. Petrich take care of you all the time?

"A—Yes, sure.

"Q—Did you see any other doctor during that first week?

"A—No.

"Q—Besides the doctor at Dr. Steller's office and Dr. Petrich?

"A—No, I didn't see anyone.

"Q—Where did you go after you left the San Pedro Hospital?

"A—Stayed home. [167]

(Deposition of Steve Ruljanovich.)

"Q—You went home?

"A—Sure.

"Q—Where did you live at that time?

"A—We lived in 14th Street.

"Q—14th Street?

"A—642 14th Street.

"Q—You didn't live with Mr. Cekalovich, did you?

"A—Yes, we live together.

"Q—Your daughter is Mr. Cekalovich's wife?

"A—Yes.

"Q—You went to Mr. Cekalovich's home and you stayed there, after you left the San Pedro Hospital?

"A—Yes, sir.

"Q—Did you stay at that home continuously up to the present time?

"A—Yes."

Mr. Kappler: The answer was "Yes," it now is "Yes, except on vacation."

"Q—You are still there?

"A—Sure.

"Q—You were living at Mrs. Cekalovich's home before this accident happened, weren't you?

"A—Yes.

"Q—When you got home, how long did you stay in bed, all of the time?

"A—No, I stayed five days, then I tried to walk a [168] little bit, but I feel still dizziness, headache."

Mr. Kappler: The answer was "No, I stayed a couple of days, then I tried to walk a little bit, but I feel still dizziness, headache."

(Whereupon an adjournment was taken until 2:00 o'clock p. m.) [169]

(Deposition of Steve Ruljanovich.)

Afternoon Session, 2:00 O'clock

Mr. Kappler: Commencing at line 1, page 11:

"Q—You felt headache and dizziness?"

"A—Yes.

"Q—During the time you were in the San Pedro Hospital, how did you feel?"

"A—I feel always headache in the beginning, then afterwards feel better, but always keep me dizzy when I move."

Mr. Kappler: That is the way it appears now. It was: "I feel always dizzy in the beginning, then afterwards feel better, but always keep me dizzy."

"Q—Did you complain about the dizziness to Dr. Petrich?"

"A—Yes, sir.

"Q—You told him all about that?"

"A—Sure.

"Q—When you left the San Pedro Hospital, you told him you were still dizzy?"

"A—Sure.

"Q—After you got home, you say you were in bed for a couple of days, and then you tried to get up, and then you felt a little dizzy?"

"A—After 5 days, yes."

Mr. Kappler: The answer was "Yes."

"Q—I take it, you didn't go back to bed right away [170] after that? You were up and around after that, more or less?"

"A—Yes.

"Q—When did you see Dr. Petrich again?"

"A—I saw Dr. Petrich after one week, a couple of times.

(Deposition of Steve Ruljanovich.)

"Q—After one week. Did you go back to the hospital again to see him?

"A—No, I went to Post Office.

"Q—He has an office in the Post Office?

"A—He has an office in the Post Office, yes.

"Q—When you went back, after the week, how did you go down to his office?

"A—Well, he says—

"Q—How did you go to his office, did you walk or ride, or go in an ambulance?

"A—First time in auto by Mr. Cekalovich."

Mr. Kappler: The answer was "Yes, I walk slowly."

"Q—You walked from 14th Street down to his office?

"A—Yes, but I took the bus, the second time."

Mr. Kappler: The answer was: "Yes, but I took the bus."

"Q—When you got down there, what did you tell him about your condition?

"A—Well, he told me—

"Q—What did you tell him?

"A—I says I always feel, I never feel like I did. That hit my teeth, these teeth don't get fixed, cost me \$100.00 [171]

"Mr. Kappler: I move to strike out the latter part of the answer, as not responsive to the question. What did you tell the doctor about how you felt, in the week you were home?

"A—He says—

"Q—I don't care what he said. What did you tell him about how you had felt during the week you were at home?

(Deposition of Steve Ruljanovich.)

"A—I told him I didn't feel like I was very good, because I feel very bad at that time.

"Q—How did you tell him you felt? You say you felt bad? Did you tell him, did you tell the doctor just exactly what made you feel so bad?

"A—Sure.

"Q—What did you tell him?

"A—I told him I got hurt in Crescent Warehouse.

"Q—He knew that before, didn't he, when you first went down to the San Pedro Hospital, how you got hurt?

"A—Yes, he says to me—I don't know myself—one board fell on my head. I didn't know, I didn't say nothing.

"Mr. Kappler: I move to strike the answer.

"Mr. Fall: Mr. Ruljanovich, he doesn't want anything other than just the answer to the question. What did you tell Dr. Petrich, when you went down to the Post Office to see him?

"Mr. Kappler: That is all.

"A—I told him, he says, 'I think stitches are all [172] right. How you feel.' I said, 'I feel very badly yet.'

"Q—Is that all you told him?

"A—Sure.

"Q—That is all you told him?

"A—Sure.

"Q—That is all you can remember?

"A—Because I know I felt a lot of time when I walked, then I feel dizziness, I have to stop."

Mr. Kappler: It did read: "I hate to stop."

"Q—Did you tell him you felt dizzy?

(Deposition of Steve Ruljanovich.)

"A—I did tell him at that time, but afterward I felt worse, in my bones, for a long time. I feel it yet, nothing like it used to be."

Mr. Kappler: The answer was in the beginning: "I didn't tell him at that time."

"Q—In other words, when you went back to Dr. Petrich at the Post Office Building, the first time, you didn't tell him you felt dizzy?"

"A—I told him I felt dizzy, but afterwards, I never did see Dr. Petrich any more.

"Q—In other words, you did tell him that you were dizzy, did you?"

"A—I told him.

"Q—Did you tell him anything else about how you felt?"

"A—No, I didn't say nothing.

"Q—What did he do for you when you went back?
[173]

"A—He gave me some pills, to take 3 tablets a day.

"Q—Is that all he did?"

"A—He gave me one little box.

"Q—Did he take your clothes off and examine you?"

"A—No, just looked at my head.

"Q—He looked at your head, at the stitches?"

"A—Yes.

"Q—Did he look at your eyes?"

"A—Sure. He saw me a couple of times, with the eyes.

"Q—He would take his finger and pull your eyelids down?"

"A—Yes, sir.

(Deposition of Steve Ruljanovich.)

“Q—He didn’t take any instrument and look in your eyes though?

“A—No.

“Q—Did he take your blood pressure?

“A—No.

“Q—How many more times did you see Dr. Petrich after that?

“A—After, from hospital, two times.

“Q—Two times after you got out of the hospital?

“A—That is all.

“Q—When did you last see Dr. Petrich, was it around the 1st of June?

“A—I guess last of May sometime.

“Q—Who was the next doctor you saw, after you last saw [174] Dr. Petrich?

“A—Then I went to Dr. Dunbar.

“Q—He is here in San Pedro?

“A—Yes, but not now. He was in San Pedro, sure.

“Q—You say he is not here now?

“A—Yes.

“Q—Dr. Dunbar was one of the doctors of the United States Public Health Service?

“A—No.”

Mr. Kappler: The Answer was “Yes.”

“Q—Was Dr. Petrich connected with the United States Public Health Service?

“A—Yes, he says to me, Dr. Petrich, ‘You can see another doctor, if you feel dizzy.’ Then I went to Dunbar for so many times, and afterwards, I saw a couple of times, Dr. Cassidy, and then Dr. Cassidy sent me to Memorial Hospital in Los Angeles.”

(Deposition of Steve Ruljanovich.)

Mr. Kappler: The answer first read: "No, he says to me," and he changed it to "Yes, he says to me."

"Q—I want to know, was Dr. Petrich connected with the United States Public Health Service?

"A—Yes, Dr. Petrich told me—"

Mr. Kappler: The answer did read: "No, Dr. Petrich told me—"

"Q—How did you come to have Dr. Petrich?

"A—I saw him a couple of times, come from hospital. [175]

"Q—Did you pay him any money?

"A—No, I didn't pay him.

"Q—Was that insurance company that paid for Dr. Petrich?

"A—No, because Fisherman had that, he told me.

"Mr. Fall: We will stipulate—

"Mr. Kappler: Who is Dr. Petrich?

"Mr. Fall: He is with the United States Public Health Service.

"The Witness: He is in the Marine.

"Mr. Kappler: Dr. Petrich is with the United States Public Health Service?

"A—Sure.

"Q—Dr. Dunbar and Dr. Cassidy were also with the United States Public Health Service?

"A—No, because I don't feel good for a long time. Afterwards, Dr. Dunbar went to Army."

Mr. Kappler: The answer was "Yes, because I don't feel good for a long time. Afterwards, Dr. Dunbar went to Army."

"Q—And did Dr. Petrich discharge you?

(Deposition of Steve Ruljanovich.)

"A—No, Dr. Petrich discharged me because he said we don't do any more. When I am from hospital, he saw me, he told me, 'You feel bad, you can find some other doctor.' He told me.

"Q—When was it you first saw Dr. Dunbar?

"A—Oh, I saw Dr. Dunbar around June. This last [176] receipt here—

"Mr. Fall: Let the record show he is looking at some receipts.

"A—Yes, sir, Dunbar, I got some receipts here. He charged me \$25.00 to visit Los Angeles.

"Mr. Fall: He asked you when did you go to Dr. Dunbar?

"(Discussion between Mr. Fall and the witness.)

"A—June 23.

"Mr. Kappler: You think you first saw Dr. Dunbar about June 23?

"A—Yes.

"Q—Is that right?

"A—Sure.

"Q—So between the end of May and the 23rd of June, you didn't see any doctor, did you?

"A—No, no.

"Q—You were not in bed during that period, were you?

"A—Yes, I been in bed. Sometimes I try to go out, and I went to bed afterwards, because I didn't feel good.

"Q—On both of the times you went down to see Dr. Petrich, you went down by yourself, didn't you?

"A—No."

Mr. Kappler: The answer was "Yes."

(Deposition of Steve Ruljanovich.)

"Q—You are not going to tell me that after you saw Dr. Petrich and before you saw Dr. Dunbar for the first time, you were in bed all the time, are you?
[177]

"Mr. Fall: To which I object, as argumentative."

Mr. Kappler: There was no answer to the question.

The Court: There is nothing to rule on then.

"Mr. Kappler: You were up and around the house, weren't you, during the time following your last visit to Dr. Petrich?

"A—Yes, that is what I told you. I saw him a couple of times. Then I went to Dr. Dunbar. Then I stayed with him.

"Q—What examination did Dr. Dunbar make of you?

"A—Dr. Dunbar, he make examination of my head. He tell me, 'Maybe you feel—

"Q—I don't care what he told you. What did he do?

"A—He visit my head, an examination he used about high blood pressure.

"Q—He examined your head?

"A—Yes.

"Q—What did he examine your head with?

"A—He took a look at it.

"Q—With his fingers?

"A—Yes.

"Q—Or with his eyes?

"A—Sure.

"Q—Did he look in your eyes with any instrument of any kind?

"A—Yes, he looked at me a couple of times.

(Deposition of Steve Ruljanovich.)

“Q—What instrument did he use? [178]

“A—You know that X-ray man. I don’t know what he calls it, because I forget it.

“Q—Tell me what he did?

“A—He took me, look see my eyes a couple of times. Then always he look in my head, and a couple of times blood pressure.

“Q. He put a band around your arm and took the blood pressure?

“A—Yes.

“Q—Did he test your heart?

“A—Yes.

“Q—Did he make any other tests of you?

“A—No, next time I feel my bone right here in the back.

“Mr. Fall: Indicating the back of his neck.

“Mr. Kappler: That is on the next visit?

“A—Yes, he says, ‘That is from your head and you got from your injury.’”

Mr. Kappler: The answer was “Yes, he says, ‘That is from your head and you got bad health.’”

Mr. Kappler: I move to strike that as hearsay, since he related the conversation that this man had with the doctor.

The Court: Yes, but you asked him.

Mr. Kappler: I asked him the question. “Did he make any other tests of you?” The answer was “No, next time I [179] feel my bone right here in the back.” Then I asked “That is on the next visit?” He said, “Yes, he says, ‘that is from your head and you got bad health.’” That was changed to “from your injury.”

(Deposition of Steve Ruljanovich.)

Then I moved to strike out the last answer as being hearsay, and also as not being responsive.

The Court: It is not responsive. Proceed. It will go out.

"Q—On the second visit that you made to Dr. Dunbar, you had a different complaint of pain, didn't you?

"A—No, no, because when I been there, always I feel dizzy.

"Q—You still felt dizzy?

"A—Yes.

"Q—You mentioned something about a pain in the back of your neck. You hadn't mentioned that before. When did that first come to light?

"A—I didn't feel it before. For two weeks afterward I couldn't move my head and neck."

Mr. Kappler: The answer was "I didn't feel it before. For two weeks afterward I couldn't move my throat."

"Q—So that just before you saw Dr. Dunbar, for the first time, you developed a sore neck, in the back?

"A—Yes, that's so.

"Q—Was it sore to the touch?

"A—Yes, sure.

"Q—Did he look at it? [180]

"A—Yes, he took a look at it, sure.

"Q—Did he put anything on it?

"A—No, he don't say nothing.

"Q—Did he do anything to it?

"A—No.

"Q—Went on back home that day, did you?

"A—Sure.

(Deposition of Steve Ruljanovich.)

"Q—How many more times did you see Dr. Dunbar?

"A—Oh, about 7 or 8 times.

"Q—When was the last time that you saw him?

"A—The last time that I saw him, August.

"Q—August, 1942?

"A—Yes, August 25.

"Q—Had your condition changed any between May 4 and August?

"A—Well, you know I feel a little better but still headaches and dizziness. Then I been home trying to work a little in garden. I tried 5 or 10 minutes. Then I stopped it and couldn't work."

Mr. Kappler: The answer was "Well, you know I feel a little better but I still dizziness."

"Q—You think though, that your condition had improved a little bit between May 4th and the end of August?

"A—Yes, a little bit, but still dizzy and headaches."

Mr. Kappler: The answer was "Yes, a little bit, but still dizzy."

"Q—Were you dizzy all of the time, every minute of the [181] day?

"A—Not all the time, but sometimes a little less. I feel now, excuse me, I feel right now just like somebody grabbed me, right now, my head."

Mr. Kappler: The answer was "Not all the time, but sometimes a little less, especially when a change weather."

"Q—In August, 1942, you didn't feel dizzy every minute of the day, it would be just certain times of the

(Deposition of Steve Ruljanovich.)

day, wouldn't it, or maybe certain times of the week, depending on the weather?

"A—No."

Mr. Kappler: The answer was "Yes, just exactly."

"Q—What did Dr. Dunbar do for you, besides taking your blood pressure once in a while, and looking at your eyes? Did he give you any medicine?

"A—Well, he give me medicine, because he told me—"

Mr. Kappler: The answer was "Well, he don't give me any medicine, because he told me—"

"Q—I don't care what he told you. Did he give you any medicine?

"A—Yes."

Mr. Kappler: The answer was "No."

"Q—Did he give you any treatment?

"A—No.

"Q—Did he do anything for you?

"A—Yes." [182]

Mr. Kappler: The answer was "No."

"Q—Did he give you any instructions as to what you were to do?

"A—Yes."

Mr. Kappler: The answer was "No."

"Q—Did he give you any special diet, special foods to eat?

"A—Oh, yes.

"Q—What did he give you?

"A—He says to me, 'Don't eat so strong food, and take a lot of vegetables and drink milk.'

(Deposition of Steve Ruljanovich.)

"Q—Did he give you that in the form of typewritten instructions, or simply tell you?

"A—No, just told me.

"Q—Just told you not to eat too heavy?

"A—Yes.

"Q—And eat lots of vegetables?

"A—yes.

"Q—Tell you anything else about what you were to do?

"A—He said to me, 'You try to work in your garden.' And then rest. Then I told you a while ago I tried 5 or 10 minutes. When I tried more, I still got dizziness and I have to stop."

Mr. Kappler: The first part of the answer read "He said to me, 'You try to work in your garden.' And then rest." And the last reading, "and I hate to stop." [183]

"Q—The situation is just this, is it, that you were able to work in the garden for a time, but after a while you got a little dizzy?

"A—That is correct.

"Q—But I take it, you took care of your garden all that time?

"A—No."

Mr. Kappler: The answer was "Sure, I took care of the garden, and when I feel it—"

"Q—When you felt it, you quit?

"A—Yes.

"Q—When did you first see Dr. Cassidy?

"A—Well, Dr. Cassidy, I seen him September 16, 1942.

(Deposition of Steve Ruljanovich.)

"Q—So you saw Dr. Cassidy about fifteen days or so after you had seen Dr. Dunbar, is that right?

"A—Yes.

"Q—What did Dr. Cassidy do for you?

"A—Same story as Dunbar, he take a look at me.

"Q—Take your blood pressure?

"A—He saw me a couple of times, what my head is—I said to him, 'Always I feel dizzy.'

"Q—What did he do about your head? What examination did he make of your head?

"A—Oh, enough examination Mister, just like Dr. Dunbar.

"Q—Did he look at your head with any special instrument? [184]

"A—No.

"Q—Did he look at your eyes with any special instrument?

"A—No.

"Q—Did he make any tests upon you?

"A—No.

"Q—Did he prescribe any medicine for you?

"A—No, just told me take light stuff to eat.

"Q—In other words, he told you the same thing as Dr. Dunbar told you?

"A—Excuse me, he gave me some pills, some tablets to take a couple of times a day.

"Q—Did he give you a prescription for that?

"A—Yes.

"Q—Did you have it filled at some drug store?

"A—On Pacific and 7th Street.

"Q—How often did you take those pills? At night or during the day?

(Deposition of Steve Ruljanovich.)

"A—Before eating at noon and night, yes, when I get up in the morning sometimes.

"Q—That is all he did for you?

"A—That is all.

"Q—Had your condition gotten any better, at all, between the time you last saw Dr. Dunbar and the time you first saw Dr. Cassidy?

"A—I told the same story up there.

"Q—Pretty near the same? [185]

"A—Yes, I told the same story.

"Q—Did your condition get better under Dr. Cassidy?

"A—Not much, but before I quit Dr. Cassidy, he sent me to professor in Los Angeles, and charged me \$25.00 for the visit."

Mr. Kappler: The answer was "Afterward, I feel like starting in to work, but before I quit Dr. Cassidy, he sent me to professor in Los Angeles, and charged me \$25.00 for the visit."

"Q—What was his name?

"A—Memorial Hospital. I am very sorry, I forget.

"Mr. Fall: Was that White Memorial Hospital?

"A—Yes, I got that at home some place, I couldn't find it this morning.

"Mr. Kappler: Do you know his name?

"A—No.

"Q—Leave a blank space in the deposition, for the name of the doctor. You can write it in when you find it?

"A—Sure."

(Deposition of Steve Ruljanovich.)

Mr. Fall: Will you stipulate that that was Dr. Courville?

Mr. Kappler: That is in the deposition. It appears in here.

"A—Sure. Dr. Cyril Courville.

"Q—As I understand, this doctor that you went to see in Los Angeles was at White Memorial Hospital?

"A—Yes. [186]

"Q—When did you see him?

"A—I saw him January sometime.

"Q—January, 1943?

"A—I can't exactly tell you, because I forgot the receipt.

"Q—Was it around the first of the year?

"A—I think so.

"Q—How many times did you see Dr. Cassidy before you went to Los Angeles to see this doctor at the White Memorial Hospital?

"A—I saw him 5 or 6 times, half a dozen times.

"Q—On each of the times that you would see Dr. Cassidy, he would simply look at you and take your history, is that right?

"A—Dr. Cassidy sent me to that doctor.

"Q—I am talking about the occasion of your visits to Dr. Cassidy, he would simply do the same thing each time, maybe take your blood pressure, look at your head?

"A—Yes.

"Q—And that is all he would do?

"A—Yes.

"Q—Was it the last visit that you went to Dr. Cassidy, that he sent you to this doctor in Los Angeles?

"A—Yes, December 4.

(Deposition of Steve Ruljanovich.)

“Q—You didn’t pay any money to Dr. Dunbar or Dr. Cassidy, did you? [187]

“A—I paid, sure.

“Q—How much did you pay to Dr. Dunbar?

“A—\$2.00 a visit.

“Q—How much did you pay altogether to Dr. Dunbar?

“A—I figured 5 times.

“Q—So you saw Dr. Dunbar about 5 times?

“A—Yes.

“Q—He charged you \$5.00 for the first visit and \$2.00 for each of the succeeding visits?

“A—Yes.

“Q—Making a total of \$13.00, that you paid to Dr. Dunbar?

“A—Yes.

“Q—Dr. Cassidy, you saw 4 times?

“A—Four times, yes. Maybe it is more, but I don’t think so.

“Q—I mean, your best recollection is that you saw him about 4 times?

“A—Yes.

“Q—He charged you \$2.00 for each of the visits, with the exception of the visit of December 4, for which he charged you \$1.50, is that right?

“A—Oh yes, sure, one time.

“Q—Then you went up to this doctor in Los Angeles, and he charged you \$25.00?

“A—Yes. [188]

“Q—What examination did the doctor in Los Angeles make?

(Deposition of Steve Ruljanovich.)

"A—Well, he made some estimates on my eyes. He asked me some questions, how I feel, how my health is. I explained what I know exactly it is, then he wrote me one big letter, saying how the condition I could eat, I don't work so hard, he wrote me one big letter.

"Q—Did he give you any treatment?

"A—No, not that time. I was there only one time.

"Q—You only saw the doctor one time?

"A—I only saw that doctor one time.

"Q—He didn't prescribe any medicine for you?

"A—Yes."

Mr. Kappler: The answer was "No."

"Q—When did you see Dr. Dickerson?

"A—Oh, I seen him a couple of times. It was some-time July or June. I don't remember."

"Q—What year?

"A—1942.

"Q—You saw him in June or July of 1942?

"A—Yes.

"Q—Then you saw him how many times, twice?

"A—Twice.

"Q—He made an examination of you too?

"A—Oh, he asked me how I feel, my ear, look at my eyes, my head.

"Q—He made the same type of examination that the [189] doctor made at White Memorial?

"A—Yes.

"Q—The same general type of examination?

"A—Yes.

"Q—After you saw this doctor at White Memorial Hospital, did you see any other doctors?

"A—Yes."

(Deposition of Steve Ruljanovich.)

Mr. Kappler: The answer was "No."

"Q—You haven't been back to see any other doctor since that visit to the man at White Memorial?

"A—Yes, sir."

Mr. Kappler: The answer was "No, sir."

"Q—You haven't been back to the United States Public Health Service?

"A—No.

"Q—You have not requested, Mr. Ruljanovich, any slip or receipt which would entitle you to go to the United States Public Health Service?

"A—No.

"Q—Did you ever make any request, of any kind, of Mr. Cekalovich, for a slip, authorizing you to go to the United States Public Health Service?

"A—No.

"Q—I take it that your condition improved after the first of the year, 1943?

"A—Yes, I work a little at the cannery, but I don't [190] work hard. Sometimes, I glue, light work, not like before.

"Q—What kind of work are you doing at the cannery now?

"A—Sometimes I stencil cases, sometimes glue.

"Q—You stencil and you put glue on the cases?

"A—I stencil and I put glue on the cases.

"Q—Is that all you do?

"A—Sometimes I try to tailing cans.

"Q—What does that consist of? What do you do when you tail cans?

"A—The can goes through machine. I stand up, the can is here, and I put 48 cans in the case.

(Deposition of Steve Ruljanovich.)

"Q—You mean, as the cans come down a conveyor belt, you take the cans and pull them off into a case?

"A—Pull them off into a case, yes.

"Q—When the case is full, what do you do?

"A—Some people pile them up.

"Q—Somebody else takes the case away?

"A—Yes, somebody else takes the case away and puts them in the car, not me.

"Q—How much do you make? How much do they pay you?

"A—He pay me 90 cents per hour. That is the warehouse.

"Q—Do you work any overtime?

"A—Sometimes, but I don't feel like long hours.

"Q—Have you worked any overtime since you went back to work?

"A—Yes, I worked a little bit 3 or 4 times." [191]

Mr. Kappler: The answer was "Yes, I worked a little bit, but not now."

"Q—Nobody is working overtime now?

"A—Yes, they are."

Mr. Kappler: The answer was "No, because not so much fish in dark."

"Q—A little while back, when you had more fish, you were working overtime?

"A—Oh, I like to go when I make my 8 hours, because the other time is long hours for me, don't do me good.

"Q—I mean, even though you don't like to work any longer, you actually do?

"A—Yes, I would be working a couple of times.

(Deposition of Steve Ruljanovich.)

"Q—How much did they pay you for overtime work?

"A—After 8 hours, time and a quarter; after 10 hours time and a half.

"Q—There were some occasions when you got time and a half?

"A—Sure.

"Q—What kind of work were you doing at the French Sardine Company before May 4, 1942?

"A—A heavier job."

Mr. Kappler: The answer was "The same job."

"Q—You were tailing cans?

"A—No, not before I didn't tail cans. Before, I work more hard, in the baskets feeding that oval machine. Not now. [192]

"Q—How much did they pay you for that?

"A—85 cents."

Mr. Kappler: The answer was "Oh, that time when I start, 45 cents, 50 cents and at the last 85 cents."

"Q—How long had you been working at the French Sardine Company before you quit?

"A—Seven years.

"Q—During that 7 year period, you hadn't done any fishing, had you?

"A—No, I don't do fishing.

"Q—Where did you work before you worked for the French Sardine Company, and 7 years before 1942?

"A—Before I worked for the French Sardine? Fishing."

Mr. Kappler: The answer was "Before I worked for the French Sardine? I been working farming, pruning trees and picking apples, all kinds of fruit."

(Deposition of Steve Ruljanovich.)

"Q—You were a farmer?

"A—15 or 16 years I been working in apples, all kinds of fruit.

"Q—How long had you done that work?

"A—I have been working for about 12 or 13 years.

"Q—When was the last time that you had ever been out to sea, as a fisherman?

"A—The last time in 1935, I been fishing seven or eight months with the owner of Alexander."

Mr. Kappler: The answer was "The last time in 1935, I [193] been fishing a couple or three months with the owner of Alexander."

"Q—In 1935, you had 3 months fishing?

"A—Maybe 1934, and 1935, about 8 months."

Mr. Kappler: The answer was "Maybe 1934."

"Q—You were out 3 months fishing sardines?

"A—No, I just fished only tuna. Yes, sardines, that is right. We were out fishing one dark in San Francisco, and one month at San Pedro. We go to local fishing tuna in San Pedro in 1935 and also Mexico."

Mr. Kappler: The last part of the answer read "We were out fishing one dark in San Francisco. We go to local fishing tuna in San Pedro in 1935."

"Q—You give me your best judgment. 1935?

"A—Yes, sure.

"Q—From that time on, you worked at the French Sardine Company?

"A—Yes.

"Q—So after you quit working on the farm, you made one fishing trip?

"A—No."

(Deposition of Steve Ruljanovich.)

Mr. Kappler: The answer was "Yes, and that was the only one."

"Q—When was it, before you worked on the farm, that you fished?

"A—I had lots of jobs. I been on Alexander. I been [194] all over. I been working fishing in a trap for Pacific American Fisheries in 1912, other fishing in 1918 and 1920."

Mr. Kappler: To the last part of that answer there was added "other fishing in 1918 and 1920."

"Q—How did you feel when you went back to work for the French Sardine Company in this year, June or July of this year?

"A—When I start to work I feel better, but always I never feel like I used to be.

"Q—Do you have any headaches?

"A—Sometimes, yes, I feel headaches, not much, but I feel sometimes.

"Q—When you went to see Dr. Petrich, did you have any headaches then?

"A—Sure, but then I feel worse."

Mr. Kappler: The answer was "Sure, but gone I feel worse."

"Q—Do you have headaches every day?

"A—Mostly steady that time every day. Now, not every day.

"Q—You had headaches when you went to see Dr. Petrich?

"A—Sure.

"Q—But not every day. You wouldn't have a headache all day long and all night long?

"A—No, steady, but every day."

(Deposition of Steve Ruljanovich.)

Mr. Kappler: The answer was "No, steady." [195]

"Q—They come back?

"A—Yes, one day a little less, one day a little worse.

"Q—When you went to see Dr. Dunbar, did you have headaches then?

"A—Yes.

"Q—Were they any worse than they had been before?

"A—Not worse, but they keep me, I don't feel to work at that time too.

"Q—When you went to see Dr. Cassidy, did you have headaches?

"A—Some, certainly.

"Q—Did you complain to him about headaches?

"A—Sure, always I complain.

"Q—Along the first of 1943, how often did you have headaches, January of 1943?

"A—Oh, you mean I feel headaches?

"Q—Leave, maybe they will last an hour and go away?

"A—You mean how long they last?

"Q—Yes?

"A—Last time, sometimes for a day, sometimes less. I tell you the truth. Yesterday, I been working, I don't feel it. This morning when I got up, it grabbed my head.

"Q—There were lots of days when you didn't have headaches at all?

"A—No, not at all. Always a little bit, not exactly perfect like it used to be. I never like that. I was [196] strong, a person my age, but I been strong for my size, but not now like used to be.

(Deposition of Steve Ruljanovich.)

"Q—I understand you are not like you used to be according to what you tell me, but I am trying to get at the headaches. Do you have them every day or not?

"A—Not every day. Like grabbing, you move your hands that way.

"Mr. Fall: Indicating a grabbing motion on the top of his head.

"A—On the top of the skull.

"Mr. Kappler: Where is the cut?

"A—Right in the center. It is only 7 stitches from here to here.

"Q—Do you pay Mr. and Mrs. Cekalovich any money for your support at the house, or did you pay any rent?

"A—Yes, we live together. I pay rent.

"Q—How much did you pay?

"A—We pay \$20.00 now.

"Q—You pay \$20.00 now?

"A—Yes.

"Q—How long have you paid \$20.00, ever since you have been working again?

"A—Sure, the beginning \$15.00. Now I pay \$20.00.

"Q—What do you mean, in the beginning?

"A—Because now it is a little more rent.

"Q—In other words, you mean before the accident, you [197] were paying \$15.00?

"A—Yes.

"Q—Who do you pay that to?

"A—I pay it to Mr. Cekalovich.

"Q—That was to cover your board and your living?

"A—No."

(Deposition of Steve Ruljanovich.)

Mr. Kappler: The answer was "We worked. We couldn't eat. I put in \$20.00. They put in \$20.00."

"Q—Before May 4, you put in \$15.00?

"A—Yes, for rent."

Mr. Kappler: The answer was "Yes."

"Q—After May 4, you were not working at the French Sardine, so between May 4 and the time that you went back to work for the French Sardine Company, you did not put in any money, did you?

"A—Yes."

Mr. Kappler: The answer was "No."

"Q—You didn't have any to put in?

"A—Yes."

Mr. Kappler: The answer was "No."

"Q—You were not making any?

"A—No.

"Q—Now, since you have been working at French Sardine, you are putting in \$20.00 a month?

"A—\$20.00 a month rent and \$60.00 a month board."

Mr. Kappler: The answer was "Sure." [198]

"Q—I take it, during the time you were laid up. Mr. Cekalovich did not expect you to pay anything then?

"A—Yes. I pay always, because sometimes I pay all the time my rent."

Mr. Kappler: The answer was originally written "No, I pay always, because sometimes I pay all the time my rent."

"Q—I thought you told me you started paying again when you went back to work?

"A—No, I pay always straight.

"Q—You paid right along?

"A—Sure, right along.

(Deposition of Steve Ruljanovich.)

“Q—Even when you were not making any money?

“A—Sure, I pay right along. I don’t want anybody to support me.

“Q—I thought you told me a minute ago, that between the time that you were injured and the time you went back to work, you didn’t pay anything?

“A—How was that?

“(Question read by the reporter.)

“A—No, I didn’t say that.

“Q—you told me, before you were hurt, you were paying \$15.00 a month?

“A—That is what I said to you, because we can get along together. Then I pay \$15.00. After, I pay now \$20.00.

“Q—you told me you started paying \$20.00 when you went back to work for the French Sardine Company, isn’t that [199] right?

“A—Sure.

“Q—you said something about your teeth being hurt. Tell me what happened to your teeth?

“A—My teeth, when I got that hit—I don’t know myself. When I come to, the doctor told me, I remember he told me, ‘You got false teeth.’ I said, ‘Yes.’ Then this tooth split.

“Q—What happened to your teeth?

“A—I split it. When I got hit, I fell down and never know. The doctor make my stitches. Afterwards he found a split tooth.

“Q—Were they your own teeth or false teeth?

“A—False teeth.

“Q—Have you had them fixed?

(Deposition of Steve Ruljanovich.)

"A—Not yet.

"Q—They are still in your mouth?

"A—Yes. Excuse me.

"Q—So your lower denture is loose?

"A—Lower denture is loose.

"Q—Did your mouth bleed inside?

"A—Yes, I feel it kind of sore.

"Q—Did it bleed inside?

"A—No, I never know. When I come to that table where he made the stitches, he says, 'You got false teeth.' I says, 'Yes.' He took them out and found that split. [200]

"Q—They didn't bleed?

"A—No.

"Did any of the doctors look at your mouth?

"A—Sure.

"Q—They didn't give you any treatment for your mouth?

"A—No.

"Q—You haven't been to see a dentist?

"A—No, I never been to see a dentist.

"Q—Are you a member of any union down here?

"A—Yes, A. F. L., Cannery Workers Union.

"Q—Were you, at any time, a member of the Fishermen's Union?

"A—Yes, I have been.

"Q—You have been a member of the Fishermen's Union?

"A—Sure, because you can't fish.

"Q—You can't go out on a boat?

"A—Can't go fishing.

(Deposition of Steve Ruljanovich.)

"Q—Before May 4, you were a member, or on May 4, you were a member of the Fishermen's Union?

"A—Yes.

"Mr. Kappler: That is all."

Mr. Kappler: Mr. Fall suggested yesterday, your Honor, that he would be willing to stipulate that the remainder of the record, which was before the Industrial Accident Commission, might go into evidence, and I accept that stipulation, and offer herewith the remainder of the [201] certified copy of the record of all the proceedings before the Industrial Accident Commission of the State of California, in the matter of Steve Ruljanovich vs. Peter Cekalovich and others.

Mr. Fall: That was the understanding yesterday.

The Clerk: Respondents' and Claimants' Exhibit E.

[Note: Respondents and Claimants' Exhibit E, because of its voluminous character, is omitted here and inserted commencing at page 242 of the Reporter's Transcript of Testimony and Proceedings on Trial.]

Mr. Fall: That was our stipulation. That is the proceeding, in which we cited the case yesterday in the District Court of Appeals, with the exception that we did not give the court number.

Mr. Kappler: That is correct.

Mr. Fall: It is in the Advanced Sheets. I think it was two weeks ago. It is in the last couple of weeks. It came out in the Advanced Sheets.

The Court: The District Court of Appeals?

Mr. Fall: The District Court of Appeals.

Mr. Kappler: I will call Mr. Ruljanovich. [202]

STEVE RULJANOVICH,

called in rebuttal, having heretofore been duly sworn, testified as follows:

Direct Examination

Q. By Mr. Kappler: You went over to the warehouse in a little truck, didn't you?

The Court: Is this under 2055?

Mr. Kappler: Yes.

A. Yes, in the little truck.

Q. You remained outside the door until it was raised?

A. I been inside the door, and sat on the wharf, on the cement.

Q. I understand that, but before you got inside on the wharf, you were outside?

A. Yes, then I went inside.

Q. When did you go inside, after they raised the door up? A. Sure.

Q. Did you go inside with Mr. Muljat and others?

A. We was all bunched together.

Q. All bunched together?

A Bunched together then; three or four men; I don't know.

Q. So you all went in about the same time?

A. Yes.

Q. How long was it, Mr. Ruljanovich, between the time [203] that you went inside, and the time you got hit in the head?

A. Not very long; 20 or 25 minutes; something like that.

Q. About 20 or 25 minutes?

(Testimony of Steve Ruljanovich.)

A. Yes. I couldn't say exactly, but something like that.

Q. During all of that period you were sitting there or standing right there?

A. No, just sitting on the wharf, on the cement, close to the nets.

Q. You were looking out toward the door, were you?

A. We were sitting, a couple of fellows with me. We talk a little bit.

Q. You looked over, though, and you saw the net, didn't you, before you were hit? A. Yes.

Q. Before the accident you saw the net?

A. Yes.

Q. You saw the door? A. Yes.

Q. You saw the truck being backed in?

A. Yes, I see the truck a couple of times back and forth, because it was too close.

Q. You went back to work in July of this year?

A. Yes, sir, July.

Q. It is true, isn't it, that you worked at least 40 [204] hours almost every week from the time that you went back to work on July 17 up until on or about October 30th?

Mr. Fall: Counsel, we stipulated he worked those hours.

The Court: That was all stipulated, counsel. Unless it is preliminary to another question, there is no dispute about it. It is a part of the record.

Mr. Kappler: That is all.

(Testimony of Steve Ruljanovich.)

Cross Examination.

Q. By Mr. Fall: Mr. Ruljanovich after October 30th did you go back to work, or did you lay off for a while?

A. After October, when I worked that time, several other times, he told me, he told before, "Steve, you like to go?" "No, because I can't last more than eight hours." He says, "We short of men. You help me." Well, then I try. Then I work several times; other times, after that I feel so tired I couldn't last, so then I stay home for seven or eight days. So they started again and I tell the foreman I won't work any more. Other people work steady all the time, and don't feel it.

Q. You went back to work after seven or eight days?

A. Sure.

Q. So you have worked since October 30th except for about seven or eight days?

A. Sure.

Mr. Fall: That is all.

Mr. Kappler: No questions. The respondents rest.
[205]

The Court: Any rebuttal on the part of the libelant?

Mr. Fall: We have nothing further, your Honor.

The Court: Any further rebuttal?

Mr. Kappler: No rebuttal, your honor.

The Court: I will ask counsel to prepare a summary of what they contend the facts establish on their side; also a short memorandum of authorities to sustain their position. Ten, ten and five. The matter will be submitted. [206]

RESPONDENTS AND CLAIMANTS' EXHIBIT
NO. E.

Before the Industrial Accident Commission of the State of California.

Steve Ruljanovich, Applicant, v. Peter Cekalovich, Dominic Mratinich, Frank Muljat, as owners and operators of the Diesel Screw "Betsy Ross", Occidental Indemnity Company, a corporation, Defendants. Claim L.A. No. 62-423.

CERTIFICATION.

I, Frank J. Burke, Secretary of the Industrial Accident Commission, hereby certify that the attached is a full, true and correct copy of the record of proceedings had before the Industrial Accident Commission in the above entitled cause.

Attest my hand and the seal of the Industrial Accident Commission of the State of California.

(Seal)

Frank J. Burke
FRANK J. BURKE,
Secretary

Subscribed and sworn to before me this 8th day of November, 1943.

(Respondents and Claimants' Exhibit No. E.)

State of California
INDUSTRIAL ACCIDENT COMMISSION
119 State Building, Civic Center
San Francisco, California

Steve Ruljanovich Applicant vs. Peter Cekalovich,
Dominic Mratinich, Frank Muljat, Diesel Screw "Betsy
Ross" Defendant. Claim No. L.A. 62-423.

(Filed 1-21-43)

NOTICE OF HEARING OF APPLICATION FOR
ADJUSTMENT OF CLAIM.

The People of the State of California Send Greetings
to the Above Named:

You are hereby notified that an application to adjust
a claim for compensation (a copy of which is attached
hereto) has been filed in the office of the Industrial
Accident Commission of the State of California, ~~HH~~

Los Angeles

State Building, ~~Civic Center~~, ~~San Francisco~~, Califor-
nia. You are further notified that said application has
been set for hearing at 915 Jergins Trust Bldg., Long
Beach California February 10, 1943 at 10:30 A. M.
and that at said time and place the Industrial Accident
Commission of the State of California will proceed to
hear and dispose of the said application in the manner
prescribed by law.

Los Angeles

Dated at ~~San Francisco~~, California, January 21, 1943.

Witness:

INDUSTRIAL ACCIDENT COMMISSION.

Lane.

George W. Lane

By ~~Frank J. Burke~~

Assistant Secretary

(Respondents and Claimants' Exhibit No. E.)

Celia Sculnick certifies that as an employee of the Industrial Accident Commission she served the foregoing notice on the parties hereinafter mentioned, at the time set opposite their respective names, by depositing a copy of said notice, attached to a copy of the application therein mentioned, in a sealed envelope in the United States mail on said day, at San Francisco, California, with the postage thereon fully prepaid, and addressed to the said parties at their last known places of business or residence, as follows, to wit:

Names of Parties Served	Date of Service
Steve Ruljanovich, 642 W. 14th St., San Pedro	Jan. 21, 1943
Peter Cekalovich, Dominic Mratinich, Frank	Jan. 21, 1943
Muljat, Diesel Screw "Betsy Ross" (indi- vidually to: 642 W. 14th St., San Pedro, Calif.	
John H. Black, 742 Broad Ave., Wilming- ton, Calif.	Jan. 21, 1943
David A. Fall, 388 W. 7th St. San Pedro, Calif.	Jan. 21, 1943

(Signature) CELIA SCULNICK

(Respondents and Claimants' Exhibit No. E.)

Before the Industrial Accident Commission of the State of California.

Steve Ruljanovich, Applicant, vs. Peter Cekalovich, Dominic Mratinich, Frank Muljat, as Owners and Operators of the diesel screw "Betsy Ross", Occidental Indemnity Company, a corporation, Defendants. Claim No. L.A. 62-423.

(Filed 2-16-43)

REPORT OF HEARING.

This Cause came on regularly for hearing on the 10th day of February, 1943, at 10:30 A. M., at 915 Jergins Trust Building, Long Beach, California, before W. Bond, Referee.

Present:

Steve Ruljanovich, applicant.

David A. Fall, attorney for applicant.

J. L. Kearney, attorney for defendants.

W. S. Garrett, reporter.

Witnesses:

Steve Ruljanovich

Dinka Cekalovich

Exhibits:

Report of Dr. C. B. Courville, 1-31-43. Applicant's Exhibit 1

Medical record of defendants: Defendants' Exhibit 1

Dr. D. G. Dickerson, 1-9-43

Dr. E. L. Gillman, 6-15-42, 5-5-42.

(Respondents and Claimants' Exhibit No. E.)

Good Cause Appearing Therefor:

It Is Hereby Ordered that the name of the defendant employers herein be corrected to read Peter Cekalovich, Dominic Mratinich, Frank Muljat, as owners and operators of the diesel screw "Betsy Ross," and that the title be amended accordingly.

It Is Further Ordered that Occidental Indemnity Company, a corporation, be and it is hereby joined as a party defendant, and that the title be amended accordingly.

* * *

The Following Facts Are Admitted:

1. Steve Ruljanovich, age 59 years, was in the employ of the named defendants Peter Cekalovich, Dominic Mratinich, Frank Muljat, as owners and operators of the diesel screw "Betsy Ross", on or about May 4, 1942, as a seaman fisherman at Terminal Island, California.

2. That on said date the Occidental Indemnity Company, a corporation, was the insurance carrier for said employers.

3. On the above date the employee sustained an injury arising out of and occurring in the course of his employment substantially as alleged in the application.

4. Medical expense incurred by applicant to be assumed by the defendant according to fee rate schedule.

5. The actual earnings may be taken at this time as \$25 a week subject to later check-up.

6. No compensation paid.

(Respondents and Claimants' Exhibit No. E.)

Issues:

1. Jurisdiction
2. Nature and extent of disability.

* * *

Disposition:

Submitted.

* * *

L A 62-423

2-11-43

Before the Industrial Accident Commission of the State of California.

Steve Ruljanovich, Applicant, vs. Peter Cekalovich, Dominic Mratinich, Frank Muljat, as owners and operators of the diesel screw "Betsy Ross," Occidental Indemnity Company, a corporation, Defendants. Claim No. L.A. 62-423.

REPORT OF HEARING AND TRANSCRIPT OF TESTIMONY.

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Present:

Steve Ruljanovich, applicant.

David A. Fall, attorney for applicant.

J. L. Kearney, attorney for defendants.

W. S. Garrett, reporter.

(Respondents and Claimants' Exhibit No. E.)

Witnesses

	pages
Steve Ruljanovich	3 - 8
Dinka Cekalovich	9 - 12

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The Following Facts Are Admitted:

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2. That on said date the Occidental Indemnity Company, a corporation, was the insurance carrier for said employers.

3. On the above date the employee sustained an injury arising out of and occurring in the course of his employment substantially as alleged in the application.

4. Medical expense incurred by applicant to be assumed by the defendant according to fee rate schedule.

(Respondents and Claimants' Exhibit No. E.)

5. The actual earnings may be taken at this time as \$25 a week subject to later check-up.

6. No compensation paid.

Issues:

1. Jurisdiction.
2. Nature and extent of disability.

The Referee: Offered and submitted in evidence report of Dr. C. B. Courville dated January 31, 1943, as Applicant's Exhibit 1, and medical record of the defendants consisting of the report of Dr. D. G. Dickerson dated January 9, 1943, the reports of Dr. E. L. Gillman dated June 15, 1942, and May 5, 1942, as Defendants' Exhibit 1.

Transcript of Testimony

STEVE RULJANOVICH,

applicant, being first duly sworn, testified as follows:

The Referee: Just proceed, then, Mr. Fall.

Direct Examination

By Mr. Fall: Q Mr. Ruljanovich, where were you injured? That is, I understand it was some place over on Terminal Island. Whereabouts on Terminal Island was it?

A Terminal Island. It was the other side. You had to go on ferry.

Q Was it at a warehouse?

A Crescent Warehouse Company.

Q It was in one of their warehouses?

A Well, there was a net in it.

(Respondents and Claimants' Exhibit No. E.)

Q The place you were injured. You were injured at one of their warehouses?

A Yes.

Q And that warehouse was on Terminal Island?

A Yes.

Q And the warehouse was situated, was it, on the ground, or was it on the water?

A On the ground.

Q And what did you go to the warehouse for?

A We went to the warehouse to get the tuna nets to the boat, and (unintelligible).

Dinka Cekalovich: He said they were going to pick the net from the warehouse and put it on the truck and put it near the boat so they could work on the net.

By the Referee: Q In other words, you went to the warehouse to pick up this net?

A We don't start to use until we already get to work.

By Mr. Fall: Q Just answer the question. He said, you went to the warehouse to get the net?

A Yes.

By the Referee: Q That is the reason you went to the warehouse to get your nets?

A Yes.

Q What happened to you?

A I was inside there where I was about sixteen or seventeen feet from the door, then when we get ready to work, sometimes you see it is time to stretch them out. They fall down sixteen feet long. It hit top of my head.

By Mr. Fall: Q Then you were taken to the emergency hospital?

(Respondents and Claimants' Exhibit No. E.)

A Yes.

Q And now at the present time are you able to go back to work?

A No.

Q At the present time are you able to go back to work?

A No, because I feel dizziness and headache.

Q When do you get this dizziness?

A Dizziness I feel when I walk, when I try to sometime walk fast. Then I get headache. I have to stop just same like drunk man.

Q When you exert energy you get dizzy. Is that it?

A Sure.

Q Have you tried to do some work?

A Yes, I tried in my garden a little work. Then when I start I feel dizzy and headache sometime for ten or fifteen minute and I have to stop.

Q Sometimes you work for ten or fifteen minutes and then you have to stop?

A Sure.

Q Because of this dizziness?

A Yes.

Q Do you get headaches as a result of that or after that?

A Yes, after.

Q I think the question as to the matter of disability it pretty well covered in the medical reports.

The Referee: All right.

Cross-Examination

By Mr. Kearney: Q You had gone to work for the owners of the Betsy Ross the day before?

(Respondents and Claimants' Exhibit No. E.)

A The day before. They told me I go fishing with them.

Q And when you went after the net where were you going to bring the net?

A We bring the nets from truck to the boat.

Q Were you going to repair them there?

A No. They fixed them up already to go to tuna.

Q Had you worked for sometime before your injury?

A No, I just, first time when he told me.

Q You had not received any money?

A No.

Q Had you been working for sometime?

A No.

Q Or had you been off work?

A I used to be working to try to little exercise.

Q Before?

A Yes.

Q Had you been working a month before, two months or three months?

A I had been working cannery, French Sardine.

Q When did you quit working for the French Sardine?

A I didn't quit just the end of this month.

By the Referee: Q. End of what month?

A This month.

Q You have been working lately in the cannery?

A Before when I get a chance to go fishing been working in French Sardine seven years.

By Mr. Kearney: Q You hadn't worked for the French Sardine Company since February?

A No.

(Respondents and Claimants' Exhibit No. E.)

Q Of 1942?

A No, no.

Q You had been off about two or two and a half months?

A Yes.

Q And then you got this position with this boat?

A Sure.

The Referee: I don't know whether he is just saying yes.

By Mr. Kearney: Q You haven't done any work since you were hit on the head?

A No.

Q Did you ride over to the warehouse on a truck or was there a truck over there?

A We ride in the truck, yes, sir.

Q Did you leave your house and go over to get the net or did you come down to the boat and then go over to get the net?

A We left the house. We went on the boat for a half hour. We work something on the rope put on the side of the boat, the deck. Then we went to the boat over there across the bay, then, afterwards, with the truck.

Q How long would it have been before the boat went out to sea, a week or ten days?

A No.

Q If you know.

A You mean?

By Mr. Fall: Q After the accident how long was it before the boat went out?

By Mr. Kearney: Q Do you know how long it was before the boat went out?

(Respondents and Claimants' Exhibit No. E.)

A Well, I got hurt.

Q Yes.

A Yes, maybe a month, twenty days, because they have to repair that net.

Q And fix up the boat otherwise?

A Yes, sir.

Q Then the boat went out to sea about twenty days after you were injured?

A Yes, I think so.

Mr. Kearney: And that is all I have of this witness.

Mr. Fall: That is all the applicant has.

The Referee: You might call this lady just a moment; just change seats.

Q Is this your father?

Dinka Cekalovich: Yes.

DINKA CEKALOVICH,

a witness, being first duly sworn, testified as follows:

Direct Examination

By the Referee: Q What is your name?

A Dinka Cekalovich.

Q What relation are you to Steve?

A He is my father.

Q Do you live in the vicinity where your father lives?

A Yes, we live in the same house. It is our, really mine and my husband.

Q And your father makes his home with you?

A Yes, my mother and father.

Q You see him all the time?

A Oh, yes.

(Respondents and Claimants' Exhibit No. E.)

Q Before he made this connection with the fishing boat, what was he doing? How did he earn his living?

A Until about seven or eight years ago he was fishing and then for six or seven years he was working in the cannery.

Q And that was the French Sardine cannery?

A Yes.

Q Before his injury how long had it been since he had worked in the cannery?

A About two months, I think.

Q He did loafing about two months?

A No, he didn't because there was no work at that time.

Q There were no sardines?

A There were no sardines.

Q And then how long had it been since he had made this connection to go fishing again before his injury?

A I beg pardon.

Q When was it he contacted these Betsy Ross boat people?

A That was—

Q When were those arrangements made?

A That was my husband, Peter Cekalovich. I wasn't there because I went to put the children in the bed, and I have two small children. My husband told me afterwards he asked my father if he wants to go fishing with them and my father said yes, he would go. He said, "There is no work in the cannery, it looks like it is going to be a pretty good year and I will go fishing with you."

Q And those arrangements were made about how long before he got hurt?

(Respondents and Claimants' Exhibit No. E.)

A The day before.

Q Just the day before?

A Because they didn't start yet.

Q Was it the understanding so far as you know that your father was to help him get the boat ready?

A Yes, like all the rest of the crew.

Q Your husband follows the fishing trade, does he?

A Yes.

Q He is a fisherman?

A Yes, he is like a skipper.

Q Is he part owner of this boat?

A Yes.

Q And that is the way he earns his living?

A Yes.

Q Now, does your father seem to be getting better?

A He is improving but he still complains about headaches and dizziness.

Q Is your husband operating the boat now?

A Yes, he is.

Q With this war, does he still go out fishing?

A Yes, maybe for a week or so on sardines.

Q Do you think your father is now able to accept employment out on the boat?

A I don't think he is.

Q You don't think he is well enough yet?

A No.

Q When does your father expect to be able to go back fishing again?

A The way he said, I don't know because he complains. One day when he start to do some work in the garden he complains about dizziness and headaches, and

(Respondents and Claimants' Exhibit No. E.)

the fishing is hard work. He is afraid. He can't take no chances.

Q How about the cannery, is that working now?

A The canneries are working. They have been working all summer and overtime but the work he was doing before it was hard work, always bending up and down.

Q Doing what?

A Doing cans, putting them in the cases.

Q Packing cans in cases?

A No, he is not packing. He is—

By Mr. Fall: Q Feeding?

A Cans, putting in the cases and putting in the big boxes.

Q Big basket?

A Of cans and he was putting them in the boxes and always going up and down. I was there lots time and saw him work.

By the Referee: Q. That is fairly heavy work?

A Yes.

Q Is there any work over there he thinks he could do now?

A I don't think so.

Q He hasn't gone over and tried?

A He has been trying around the house, around the yard.

Q You think maybe he is getting gradually better?

A I think he is.

Mr. Fall: I think he is too. He told me he is getting better.

The Referee: Would you like to ask this lady anything, Mr. Kearney?

(Respondents and Claimants' Exhibit No. E.)

Mr. Kearney: I have no further questions.

Mr. Fall: I have no questions.

The Referee: All right. We will mark the case submitted at this time.

CERTIFICATION.

I, W. S. Garrett, hereby certify that I was present at the hearing of the matter as entitled on the first page hereto; that I took shorthand notes of the proceedings had; that I thereafter transcribed said notes into long-hand writing; that the foregoing pages, number one to twelve, inclusive, contain a full, true and correct statement of the proceedings had and testimony taken thereat.

W. S. Garrett

Reporter.

Los Angeles, California, April 2, 1943.

"Applicant's Exhibit 1"

COLLEGE OF MEDICAL EVANGELISTS

Los Angeles, California

Department of Neurology

Name Ruljanovich, Steve

Case No. 1840

Address: 642 West 14th Street, San Pedro, California

60 Male Caucasian Yugoslavian Cannery Worker
Married

Referred by: E. S. Cassady, M. D., 844 South Pacific Avenue, San Pedro, Calif.

History

Dr. Courville

January 31, 1943

Informant:

The patient.

(Respondents and Claimants' Exhibit No. E.)

Chief Complaints:

1. Dizziness and instability following an injury to the head in May, 1942.
2. Frequent attacks of headache at the site of a scalp laceration received in the injury of May, 1942.

History of Present Complaints:

Previous Relevant History:

Prior to the accident the patient was in good health, as far as he knows, and had no complaints or illness.

Onset:

On May 4, 1943, while getting ready to go to work, a 4 x 4 timber 16½ feet long fell from above, striking the patient on the top of the head. He received a contusion and laceration of the occipito-parietal scalp and was dazed by the blow, but apparently was not rendered completely unconscious.

Course:

The patient was taken to the hospital almost immediately following the accident, where he received first aid and attention to the scalp wound. He vaguely remembers the incidents of the first day, but it all seems "like a dream" to him. He remained in the hospital for a period of seven days and then remained in bed at home for an additional six or seven days. After getting up and around again he was unable to resume his work because of the exaggeration of symptoms provoked by the slightest exercise. He has apparently made some improvement, but continues to have attacks of dizziness and frequent headaches, and is still unable to work.

(Respondents and Claimants' Exhibit No. E.)

Symptoms in Detail:

1. The dizziness and unsteadiness. These symptoms have been present since the accident on May 4, 1942. They are persistent, and the patient states that they prevent him from working. The dizziness is not rotatory. It is more a feeling of unsteadiness or "light-headedness" or faintness that occurs periodically and is aggravated by exercise and especially by bending over. Changes in the weather likewise make the symptoms worse. Occasionally he is awakened from sleep by the dizziness, and if he gets up out of bed there will be a "grabbing pain" in his head.

2. The headache. The patient has had rather frequent attacks of headache since the injury. The pain is confined to the vertical region of the head in the area of the scalp laceration, and it is described as a sharp "grabbing" type of pain which is aggravating but not severe.

Physicians Seen:

1. Dr. John Patrick.
2. Dr. R. W. Stellar.
3. Dr. Dunbar.
4. Dr. E. S. Cassady.

Treatment:

The patient received immediate attention to his injury in the San Pedro Hospital, but has had no subsequent treatment.

Present Condition:

At the present time the patient is able to get around, but must refrain from all exercise. As long as he

(Respondents and Claimants' Exhibit No. E.)

remains quiet he is quite free from symptoms, except that he is occasionally awakened out of sleep by dizziness and headache.

Past History:

The patient was born in Yugoslavia, where he lived 27 years. He lived in Washington nine years, and has been in California for 24. Until the time of his injury he was employed in a cannery in San Pedro. He has been married for thirty-four years to Mileza Ruljanovich.

The patient states that he uses no alcohol and no tobacco, and at present uses no coffee or tea.

He has had tonsillitis, influenza and high blood pressure. He had his tonsils removed in 1916, but has had no other operations. On May 4, 1942, he sustained an injury to the head by a falling piece of timber. He has been unable to work since then.

His father died at 45 of pneumonia. His mother died at 85 of old age. He has a brother and a sister living. He knows nothing of the family history, since all his relatives are in Yugoslavia.

Examination

Status Praesens:

The patient is a well developed, well nourished man of 60 who presents no outward abnormal neurological manifestations.

The head is of normal size and shape. There is no tenderness of the scalp or evidence of increased tension. There is an old linear scar extending from the vertex toward the frontal region. The ears, nose and throat are normal. The lungs and heart are normal. The

(Respondents and Claimants' Exhibit No. E.)

blood pressure was 158/98. The brachial arteries are tortuous and pulsating. The radial arteries are firm and sclerotic. The abdomen is soft and not tender. The extremities are normal.

Cranial Nerves:

I. Olfactory—No subjective loss or impairment of sense of smell. No parosmia. Patient is able to identify clearly test odors.

II. Optic—The patient wears glasses for reading only. There have been no recent changes in vision. The fields are normal. The optic disks are well outlined. Cupping is present. The vessels are normal.

III, IV, VI. Oculomotor, Trochlear and Abducens—No double vision. The pupils are round, but slightly unequal in size, the left being larger than the right. The pupils react to light but the reaction is not maintained well. There is no nystagmus, no exophthalmos or enophthalmos.

V. Trigeminal—No subjective pain or numbness of the face. No disturbance of sensation as determined by usual methods. No weakness of the muscles of mastication.

VII. Facial—No subjective weakness of the face. No secretory disturbance or subjective disturbances of taste. Sensation about external ear is normal. No objective weakness of facial muscles.

VIII. Acoustic—Auditory Division—There has been no impairment of hearing. The watch is *hear* at 16" right and left. The Weber is not lateralized. AC is greater than BC right and left.

Vestibular Division—There has been no ataxia or vertigo.

(Respondents and Claimants' Exhibit No. E.)

IX, X. Glossopharyngeal and Vagus—No dysarthria or dysphagia. No nausea or vomiting, projectile or otherwise. No deviation of uvula. Movements of palatal curtain equal right and left. Pharyngeal reflexes normal.

XI. Accessory—No weakness or atrophy of sternomastoid or trapezius muscles.

XII. Hypoglossal—No deviation, atrophy or tremor of the tongue.

Motor System:

The posture and gait are normal. There is no evident disturbance of the pyramidal system. The grips of the hands are 75 kg. on the right and 60 kg. on the left.

The deep reflexes are all present and equal on the two sides, but iniversally hyperactive. There are no pathological reflexes. The superficial abdominal and cremasterics are present and equal right and left.

There is no history of a disturbance of skilled movements or stereotyped movements in the present illness. The musculature of the extremities showed no spasticity. None of the special signs referable to the extrapyramidal system are noted.

No tremors, rigidity or other signs of the parkinsonian syndrome are present to indicate a lesion of the basal ganglia. No athetosis or choreiform movements were observed.

Cerebellum:

The patient presents no history of ataxia or unsteadiness of gait. On examination there was no tendency to walk with a broad base, and no unsteadiness of gait

(Respondents and Claimants' Exhibit No. E.)

was evident. No evidence of disorders of movement such as dysmetria, ataxia, decomposition of movement, disturbances of rate or force or adiadokokinesia were present. No hypotonia, tremor or nystagmus was found.

Sensory System:

General Senses:

There has been no subjective history of disturbances of sensation, and on examination all sensory modalities—touch and pressure, pain and temperature, vibration and position sense—were found to be intact. No subjective complaints suggestive of disease of the thalamus were present in the history, and on examination none of the special symptoms or signs indicative of a lesion of the parietal cortex were in evidence.

Olfactory and Gustatory Senses:

There is no subjective history of impairment or loss of olfactory or gustatory acuity, nor of suggestive parosmia or hallucinations noted. On examination the patient was able to detect test odors, and the taste faculty seemed to be intact. There was no history of dreamy states.

Visual System and Occipital Lobe:

The patient wears glasses for reading only. There have been no recent changes in vision. The fields are grossly normal. The pupils are round, unequal in size. They react to light and the reaction is poorly maintained. There is nothing to indicate any disturbance of the extraocular motor mechanism.

Auditory System:

There has been no tinnitus and no impairment of hearing. The watch is heard at about 16" right and

(Respondents and Claimants' Exhibit No. E.)

left. The Weber is not lateralized. AC is greater than BC right and left.

Vestibular System:

Dizziness of the type to suggest involvement of the vestibular nerve or end organ was not complained of. There was no record of ataxia. Nystagmus or past-pointing was not evident on examination. There is nothing to suggest involvement of the cerebellum or of the cortex of the temporal lobe.

Meningeal Signs:

There is no history of symptoms to suggest meningeal irritation, and on examination no stiffness of the neck, no Kernig or Brudzinski signs were evident.

Apraxia, Acnosia, Aphasia:

No special disturbances of motor function were evident on examination to suggest the presence of apraxia. There was no history of failure to recognize common objects or symbols by sight. The patient is capable of understanding spoken language. There is no history to suggest and no findings to indicate motor or sensory aphasia.

Mental Status:

The patient does not present any abnormalities of appearance or behavior. There is no evident disturbance of the emotional state. Judgment and insight are good. There was no evidence of any of the organic syndromes of the frontal lobe.

Spinal Cord and Peripheral Nerves:

On examination there was nothing to suggest any involvement of the spinal cord or peripheral nerves.

(Respondents and Claimants' Exhibit No. E.)

Autonomic Nervous System:

A review of the patient's history fails to disclose any symptoms suggestive of an imbalance of the peripheral sympathetic or parasympathetic systems and no symptoms or signs were suggestive of a disturbance of hypothalamic function. None of the specific hypothalamic syndromes were evidenced either subjectively or on examination. No autonomic symptoms were discovered which might indicate cortical disturbance in this sphere.

Summary of the positive findings:

Subjective Symptoms:

1. Dizziness and instability following an injury to the head on May 4, 1942.
2. Frequent attacks of headache at the site of a scalp laceration received in the injury of May 4, 1942.

Objective Symptoms:

1. The patient is a well developed, well nourished man of 60 who does not present any evident outward neurological abnormalities.
2. There is a linear scar of the vertical scalp.
3. The optic disks are well outlined. The cups are present. There is no papilledema.
4. The pupils are round; the left is larger than the right. They react rather poorly to light and accommodation.
5. The deep reflexes are all present, moderately hyperactive and equal right and left. There are no pathological reflexes.
6. There is moderate generalized arteriosclerosis. Blood pressure was 158/98.

(Respondents and Claimants' Exhibit No. E.)

Discussion:

The subjective manifestations presented by the patient are fairly typical of the vasomotor instability that is so frequently associated with the post traumatic state. The mechanism of the injury—a falling object striking the head while stationary—was of a nature to produce a definite concussion, but most likely nothing more serious than this.

Tentative Diagnosis:

Commotio cerebri. Post traumatic vasomotor instability.

Advise:

1. Prostigmine bromide, 15 mg. three times a day.

Cyril B. Courville, M. D.

"Defendants' Exhibit 1"

DORRELL G. DICKERSON, M.D., F.A.C.S.

1401 So. Hope Street

Los Angeles, California

January 9th, 1943.

Ruljanovich, Steve.

642 - 14th Street, San Pedro, California.

Age:

59 years. Married—father of one child.

Employer:

French Sardine Co., San Pedro, Calif.

Occupation:

Laborer-fisherman.

Date injured: 5/4/42.

Interval History:

Has not been working since he was seen here last—8/1/42. No work for wages—no home chores. Has

(Respondents and Claimants' Exhibit No. E.)

been to see Dr. Cassidy—about one month ago at San Pedro. Progress remains about the same.

Complaints:

"Dizziness—spine, behind—can't touch it—at times because it is sore. When I walk I get a grab in my head—this is like ants in my head. I don't feel like working because of the dizzy head and the sore spine. Don't sleep very good because the grabbing in my head makes me nervous and I have to get up at night. My appetite is not so bad—medium. Weight is 163 lbs. Bowels at times constipated."

Examination:

Steve Ruljanovich is a short, stocky man of swarthy complexion. Height 5' 5"—weight 165 lbs. Head normal in shape and size—scar, irregular—at vertex— $\frac{3}{4}$ " lateral to the midline— $2\frac{1}{2}$ x 3" long. Healing has been normal. Ears negative. Tonsils have been removed. Mouth clean—partially edentulous—lower central incisors need attention—some gingival irritation present. Neck is normal. Tender on 7th. cervical spine. No spasm or limitation in motion. No crepitus. Thyroid not palpable. Post cervical lymph nodes not enlarged. Heart tones moderately accentuated. No murmurs or thrills. Blood pressure 150 over 80. Pulse normal rate and quality. Peripheral vessels palpable.

Abdomen:

No complaints. Extremities are anatomically normal.

Neurological:

Olfactory sense normal.

(Respondents and Claimants' Exhibit No. E.)

Vision:

Marked myopic state present—visual acuity—OD. 20/40 — OS. Fundi negative. Ocular movements normal. No diplopia. No nystagmus. Face is symmetrical. Trifacial normal. Tongue in the midline. Bite equal.

Auditory:

AC. greater than BD. Weber referred. Shoulders of equal strength and tone. Deep reflexes are all present, equal and about one plus in arms and shoulders. Superficial reflexes present and normal. No pathological reflexes. No clonus. Sensory examination negative. Motor tests: no atrophy—no weakness. Coordination normal. Cerebellar tests negative. No tremors. Romberg negative. Gait natural. Cerebral lobes: frontal, normal mental state. Temporal, speech normal. Parietal, normal. Occipital, visual fields normal on confrontation tests. Re-check on Romberg test: sways in this posture.

Conclusions:

This man complains of vertigo especially when stooping or bending forward. He also states that there is a crawling sensation in his forehead and tenderness over the 7th cervical spine. There are no signs of brain injury but his symptoms are those of *commotio cerebri*.

The nature of his injuries was such that it is reasonable to expect such symptoms, especially in one of his age and with high blood pressure (elevated).

I do not think he can work as a fisherman at present because if he should become dizzy he runs a good chance of falling and hurting himself. These cases are usually

(Respondents and Claimants' Exhibit No. E.)

chronic and where the blood pressure is up, symptoms are worse and run a long course.

Advise treatment for high blood pressure—small doses of phenobarbital should help.

Disability: temporary total—duration undetermined.

DORRELL G. DICKERSON, M.D.

dgd.jed.

"Defendants' Exhibit 1"

June 16, 1942

Mr. Murray H. Roberts
Citizens National Bank Bldg.,
Wilmington, California

Re: Steve Ruljanovich
Emp: Peter Cekalovich (Betsy Ross)
Inj: May 4, 1942

Dear Mr. Roberts:

Pursuant to your request I examined the above captioned patient on June 15, 1942 here in this office.

History of injury:

On the 4th day of May, 1942 at about 9:30 in the morning this patient was struck on the head by a 6 x 6 timber which fell from above. He was brought here and first-aid was rendered him by me. Subsequently to this he was hospitalized in the San Pedro Hospital where he was treated by the U. S. Public Health Service.

Present complaints:

1. Dizziness. This is occasional and more marked on change from the horizontal to the vertical position such as arising from bed in the morning.

(Respondents and Claimants' Exhibit No. E.)

2. Stiffness of the neck.

3. Morning headaches which are relieved by capsules which he is taking at the present time.

Personal history:

Patient is a white male, age fifty-nine, 5' 6" in height, 155 lbs. weight, blue eyes, gray hair, married and has one child a daughter, age thirty-two.

Past history:

1. Medical: Pleurisy, five or six years ago. Tonsillitis, twenty-five years ago.

2. Venereal diseases are both denied.

3. Surgical: T. & A. twenty-five years ago.

4. Traumatic: He states he had had no previous accidents or broken any bones.

Physical examination:

Examination is that of a well developed man about fifty-nine years of age who does not appear to be acutely ill at this time.

Head: Hair is plentiful, slightly gray. Scalp well nourished. There is a well healed, four inch laceration of the scalp beginning in the mid parietal region and running anterior to the mid frontal region. This is all within the hair line.

Neck: There are no palpable glands. The thyroid gland is not palpable.

Eyes: Pupils are equal and react to light and accommodation. There is no nystagmus present. His vision is 20/40 bilaterally and he wears glasses for reading.

Nose: Septum in the mid line. There is no engorgement of the nasal mucosa.

(Respondents and Claimants' Exhibit No. E.)

Mouth: There is a full denture above and a partial one below. The remaining lower teeth are carious.

Throat: The tonsillar fossa is slightly injected. The tonsils have been removed.

Ears: Both auditory canals are filled with cerumen. The drum heads appear normal.

Chest: The chest is symmetrical throughout. Percussion note is normal. Breath sounds are clear throughout. There are no rales heard.

Heart: The cardiac borders are within normal limits. The sounds are equal and regular. The pulse rate is 88. There are no murmurs. Blood pressure is 140/78.

Abdomen: The abdomen is symmetrical and scaphoid. There are no areas of tenderness, masses or tumors palpated.

Back: Cervical, dorsal and lumbar spine normal throughout.

Inguinal regions: The external, inguinal rings are tight on both sides, and there are no impulses felt on coughing or straining.

Reflexes: Reflexes are physiological throughout. The Romberg is negative.

Discussion:

It is the writers' opinion that this patient sustained a severe contusion to his head with moderate cerebral concussion, and a four inch laceration of the scalp for which he received adequate treatment in the hospital. He has been discharged from the hospital and has been reporting to Dr. Petrich of the U. S. Public Health Service at the hospital at two week intervals. The last time he saw Dr. Petrich was about two weeks ago at

(Respondents and Claimants' Exhibit No. E.)

which time the doctor informed him that he did not think he needed further treatment, and to only return for treatment if he had any trouble.

The present symptoms of dizziness and headache are all residual from his moderate cerebral concussion. These are, no doubt, disabling at the present time, but I do not believe this disability will run more than two to three weeks further, and at that time this patient should be able to return to all his usual duties concerned with his employment. There should not be any permanent effects from this injury.

Yours very truly,

R. W. STELLAR, M.D.

By E. L. GILLMAN, M.D.

ELG:JB

"Defendants' Exhibit 1"

R. W. STELLAR, M.D., F.A.C.S.

1019 Avalon Boulevard

Wilmington, Calif.

May 5, 1942

Mr. Murray Roberts

742 Broad Avenue

Wilmington, California

Re: Steve Ruljanovich

Emp: Peter Cekalovich

Inj: May 4, 1942

Dear Mr. Roberts:

I first saw the above captioned patient on May 4, 1942. He states that he was employed for the day by

(Respondents and Claimants' Exhibit No. E.)

Mr. Peter Cekalovich of the "Betsy Ross" and that he was standing on the dock of the Crescent Wharf and Warehouse Co., getting ready to work, when a 6 x 6 timber fell from above striking him on the top of the head. Fellow workers state he was rendered unconscious and was so for approximately two minutes. He complains of no other injury.

Injuries consist of contusion of the occiput, 7 inch laceration (scalp), and a moderate cerebral concussion. X-rays taken of the skull were negative for fractures. Treatment consisted of suture of the laceration. The patient was sent to the San Pedro Hospital to be taken care of by the Public Health Authorities.

It is the writer's opinion that this man sustained severe contusion of the occiput with moderate cerebral concussion. I would estimate that this man would be confined to the hospital for a period of three to four weeks and will be totally disabled for a period of three to four months. Of course, you understand that this disability is very hard to determine since I have seen the man only once while rendering first aid and cannot estimate his progress in the hospital.

Yours very truly,

R. W. STELLAR, M.D.

By E. L. GILLMAN, M.D.

ELG:MP

(Respondents and Claimants' Exhibit No. E.)

Before the Industrial Accident Commission of the State of California. Claim No. L. A. 62-423.

Steve Ruljanovich, Applicant, vs. Peter Cekalovich, Dominic Mratinich, Frank Muljat, as owners and operators of the Diesel Screw "Betsy Ross," Occidental Indemnity Company, Defendants.

(Filed 2-25-43)

FINDINGS AND AWARD.

David A. Fall attorney for applicant.

J. L. Kearney attorney for defendants.

An application for adjustment of claim for compensation having been filed herein, and all parties having appeared, and the matter having been regularly submitted for decision, W. Bond, Referee, makes his Findings and Award as follows:

Findings of Fact.

1. Steve Ruljanovich, applicant, while employed as a seaman fisherman, at Terminal Island, California, on or about May 4, 1942, by Peter Cekalovich, Dominic Mratinich and Frank Muljat, as owners and operators of the diesel screw "Betsy Ross," sustained injury arising out of and occurring in the course of said employment when he was struck on the head by a timber.

On said date said employer's insurance carrier was Occidental Indemnity Company, a corporation, and both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Laws of the State of California.

2. Said employee at the time of the injury was not engaged in work in connection with his occupation as

(Respondents and Claimants' Exhibit No. E.)

seaman and said injury did not occur on a vessel or on navigable waters outside of the State of California but within the boundaries of the State of California, and therefore this Commission has jurisdiction in this proceeding.

3. Said injury caused temporary total disability from May 4, 1942 to and including February 10, 1943 and indefinitely, entitling the employee to \$15.44 a week during said time, less the waiting period of seven days. The foregoing weekly benefit is based upon wages of \$25.00 a week.

4. Applicant's attorney is entitled to a lien against unpaid compensation, for the reasonable value of his services, in the sum of \$35.00.

Award.

Award Is Made in favor of Steve Ruljanovich, applicant, against Occidental Indemnity Company, a corporation, of the sum of \$15.44 a week, beginning May 12, 1942 and continuing until the termination of disability or the further order of this Commission, less the sum of \$35.00 payable to David A. Fall, as attorney's fee.

It Is Ordered that the employers be and they are hereby relieved from liability and dismissed herefrom.

W. BOND

Referee, Industrial Accident Commission

Dated at Los Angeles California

Feb 25 1943

(Seal)

WB:EA

LA 62-423

(Respondents and Claimants' Exhibit No. E.)

Before the Industrial Accident Commission of the State of California. Claim No. L. A. 62-423.

Steve Ruljanovich, Applicant, vs. Peter Cekalovich et al., Defendants.

(Filed Feb. 25, 1943)

CERTIFICATE OF SERVICE

State of California, County of Los Angeles—ss.

Emma S. Hunt certifies that as an employee of the Industrial Accident Commission, she did on Feb. 25, 1943, serve

Findings and Award

in the above entitled proceeding now pending before the Industrial Accident Commission of the State of California, on each of the parties hereinafter named, by depositing said copies in sealed envelopes, with the postage thereon fully prepaid, in the United States mail in the County of Los Angeles, State of California, on said day addressed to each of said parties at his last known place of business or residence, as follows:

Steve Ruljanovich, 642 W. 14th St., San Pedro.

David A. Fall, 388 W. 7th St., San Pedro.

Peter Cekalovich, Dominic Mratinich & Frank Muljat, 642 W. 14th St., San Pedro.

Occidental Indemnity Co., 726 Standard Oil Bldg., L. A.

Att. J. L. Kearney

S F

Signature

EMMA S. HUNT

Dated at Los Angeles California

Feb 25, 1943

(Respondents and Claimants' Exhibit No. E.)

Before the Industrial Accident Commission of the State of California. Claim No. L. A. 62-423

Steve Ruljanovich, Applicant, vs. Peter Cekalovich, Dominic Mratinich, Frank Muljat, as owners and operators of the Diesel screw "Betsy Ross" and Occidental Indemnity Company, a corporation, Defendants.

(Filed 3/17/43)

PETITION FOR REHEARING

Comes Now Occidental Indemnity Company, a corporation, one of the defendants above named, and hereby petitions your Honorable Commission for a rehearing of the above entitled cause upon the following grounds, to-wit:

1. That the Commission acted without or in excess of its powers.
2. That the evidence does not justify the findings of fact.
3. That the Commission is without jurisdiction.

Statement of Facts

Steve Ruljanovich, applicant herein, was employed as a seaman fisherman on or about May 4th, 1942, by the defendant employer herein to work on the tuna boat "Betsy Ross." On said date while in the act, with other members of the crew, of obtaining the ships tuna nets from the Crescent Warehouse, approximately one mile from the boat dock, said Steve Ruljanovich sustained injury arising out of and during the course of his employment as a seaman. These nets were to be taken directly to the tuna boat "Betsy Ross."

(Respondents and Claimants' Exhibit No. E.)

Defendant's Contention

It is your petitioning defendant's contention that by virtue of the facts stated above the sole and original jurisdiction of the injury sustained by Mr. Ruljanovich rests under the Jones Act in the United States District Court.

Argument

The applicant herein, subsequent to decision by the Industrial Accident Commission, has filed an action in the United States District Court, being No. 26930C entitled *Steve Ruljanovich vs. Peter Cekalovich, Dominic Mratinich, Frank Muljat*, as owners and operators of the Diesel screw "*Betsy Ross*." This action is based on "libel in rem and in personam" for maintenance and cure for injuries suffered in the course of his service to his vessel, the "*Betsy Ross*," even though those injuries were sustained on land.

While originally there was a question of the jurisdiction of the District Court of the United States of injuries of seamen suffered while on land although in the service of their vessels, the jurisdiction is now undisputed and supported by the case of *Daniel O'Donnell vs. Great Lakes Dredge and Dock Company*, 87 L. Ed. advance opinions 456. In that case the petitioner was a deckhand on the vessel "*Michigan*" engaged in transporting sand over the navigable waters of Lake Michigan. While said vessel was at dock the petitioner was ordered to go ashore and assist in the repair of a gasket connection used to discharge cargo. While so engaged the alleged negligence of a fellow employee caused a heavy counter weight to fall on petitioner causing the

(Respondents and Claimants' Exhibit No. E.)

injuries of which he complained. Action was brought in the District Court of the United States for the Northern District of Illinois, Eastern Division, under the Jones Act, for personal injuries, which court dismissed the seaman's action but granted an award for wages. On writ of certiorari to the United States Circuit Court of Appeals the judgment of the District Court was modified, allowing an additional award for maintenance and cure but holding that no recovery could be had under the Jones Act for injury to a seaman not occurring on navigable waters. The case was presented to the Supreme Court of the United States on the question of "whether a seaman injured on shore while in the service of his vessel is entitled to recover for his injuries in a suit brought against his employer under the Jones Act." The decision answers this question in the affirmative, reversing the action taken by the United States Circuit Court of Appeals, stating as follows:

"The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. See *Waring v. Clarke*, 5 How (US) 441, 12 L. ed. 226, and *New England Mut. M. Ins. Co. v. Dunham*, 11 Wal. (US) 1, 20 L. ed. 90, *supra*.

It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea, by giv-

(Respondents and Claimants' Exhibit No. E.)

ing to him the indemnity which the maritime law *afforded* to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle." 87 L. ed. 456 at 460.

Wherefore, petitioner respectfully contends that finding No. 2 of the findings and award issued February 25, 1943, by your Honorable Commission is not supported by the evidence and that the evidence decisively discloses that your Honorable Commission has no jurisdiction over the subject matter herein.

Petitioner respectfully submits that the findings and award are not in harmony with the facts and testimony and prays that the award be set aside and a rehearing granted.

Respectfully submitted,

J. L. KEARNEY and

HERBERT S. MCCARTNEY, JR.

HERBERT S. MCCARTNEY, JR.

Attorney for Defendants

cc mailed to:

David A. Fall, Esq.

388 W. 7th Street

San Pedro, California on 3/17/43.

State of California, County of Los Angeles—ss.

Herbert S. McCartney, Jr. being by me first duly sworn, deposes and says; that he is the attorney for the Occidental Indemnity Company, one of the defendants in the foregoing and above entitled action; that he has read the foregoing petition for rehearing and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are

(Respondents and Claimants' Exhibit No. E.)

therein stated upon his information or belief, and as to those matters that he believes it to be true, and as such attorney is entitled to make this verification on and behalf of said Occidental Indemnity Company.

HERBERT S. McCARTNEY, JR.

HERBERT S. McCARTNEY, JR.

Subscribed and sworn to before me this 17th day of March, 1943.

(Seal)

A. J. WALKER,

Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires Aug. 5, 1945.

Law Office

J. L. KEARNEY

605 West Olympic Boulevard

Los Angeles, California

March 17, 1943

Industrial Accident Commission

903 State Building

Los Angeles, California

Re: Steve Ruljanovich vs. Peter Cekalovich, et al
L. A. Claim No. 62-423

Gentlemen:

Enclosed please find petition for rehearing in the above captioned matter. We enclose also for your convenience Law. ed. Advance Opinions, 1942-1943, Vol. 87, No. 8, containing the cited case at page 456 thereof.

Very truly yours,

(Signed) HERBERT S. McCARTNEY, JR.

HSMcC:jr

Enc.

(Received 3/17/43)

(Respondents and Claimants' Exhibit No. E.)

Before the Industrial Accident Commission of the State of California. Claim L. A. No. 62-423.

Steve Ruljanovich, Applicant, vs. Peter Cekalovich, Dominic Mratinich, Frank Muljat, as owners and operators of the Diesel Screw "Betsy Ross," Occidental Indemnity Company, a corporation, Defendants.

(Filed 4-7-43)

ORDER DENYING PETITION

The record herein having been reviewed and no good cause for rehearing having been shown by the Petition for Rehearing filed herein by defendant Occidental Indemnity Company, a corporation, on March 17, 1943;

It Is Ordered that said Petition be and it is hereby denied.

INDUSTRIAL ACCIDENT COMMISSION OF
THE STATE OF CALIFORNIA

PAUL SCHARRENBURG

A. WATCHMAN

J. C. GARRISON

Commissioners.

Dated at Los Angeles California

Apr 7 - 1943

(Seal)

CHMcC/os

(Respondents and Claimants' Exhibit No. E.)

Before the Industrial Accident Commission of the State of California. Claim No. L. A. 62 423.

Steve Ruljanovich, Applicant, vs. Peter Cekalovich, Dominic Mratinich, Frank Muljat, as owners and operators of the Diesel Screw "Betsy Ross," Occidental Indemnity Company, a corporation, Defendants.

(Filed 4-7-43)

CERTIFICATE OF SERVICE

State of California, County of Los Angeles—ss.

Emma S. Hunt certifies that as an employee of the Industrial Accident Commission, she did on Apr. 7, 1943 serve

Order Denying Petition

in the above entitled proceeding now pending before the Industrial Accident Commission of the State of California, on each of the parties hereinafter named, by depositing said copies in sealed envelopes, with postage thereon fully prepaid, in the United States mail in the County of Los Angeles, State of California, on said day addressed to each of said parties at his last known place of business or residence, as follows:

Steve Ruljanovich, 642 W. 14th St., San Pedro

David A. Fall, 388 W. 7th St., San Pedro

Peter Cekalovich, Dominic Mratinich, Frank Muljat,
642 W. 14th St., San Pedro

(Respondents and Claimants' Exhibit No. E.)

Occidental Indemnity Co., 548 So. Spring, LA

J. L. Kearney, 726 Standard Oil Bldg., LA

SF

Signature

EMMA S. HUNT

Dated at Los Angeles California

Apr 7 - 1943

[Stamped]: Date: No. E in evidence.

[Endorsed]: No. 10705. United States Circuit Court of Appeals for the Ninth Circuit. Peter Cekalovich, Dominic Mratinich and Frank Muljat, owners of the Diesel Screw "Betsy Ross," Appellants, vs. Steve Ruljanovich, Appellee. Steve Ruljanovich, Appellant, vs. Peter Cekalovich, Dominic Mratinich and Frank Muljat, owners of the Diesel Screw "Betsy Ross," Appellees. Apostles on Appeal upon Appeals from the District Court of the United States for the Southern District of California, Central Division.

Filed March 10, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit.

Diesel Screw "Betsy Ross," her *tackel*, etc. and Peter Cekalovich, Master of said vessel, and Peter Ceka-
lovich, Dominic Mratinich and Frank Muljat, her
owners, Appellants, vs. Steve Ruljanovich, Appellee.

Case No. 10705.

STATEMENT OF POINTS ON WHICH APPEL-
LANTS INTEND TO RELY ON APPEAL
AND DESIGNATION OF PARTS OF
RECORD NECESSARY FOR THE CONSID-
ERATION THEREOF.

Appellants hereby adopt the Assignments of Error
filed in the United States District Court as the State-
ment of Points relied upon in this appeal.

Appellants hereby request that the entire record filed
in this court be printed.

Dated: March 21st, 1944.

HENRY E. KAPPLER

Proctor for Appellants.

(AFFIDAVIT OF SERVICE BY MAIL—1013a,
C. C. P.)

State of California, County of Los Angeles—ss.

Frances Cooper, being first duly sworn says: That
affiant is a citizen of the United States and a resident
of the County of Los Angeles; that affiant is over the

age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 639 South Spring St., Los Angeles 14, California, that on the 21st day of March, 1944, affiant served the within Statement of Points on Which Appellants Intend to Rely on Appeal, etc., on the appellee in said action, by placing a true copy thereof in an envelope addressed to the proctor of record for said appellee at the office address of said proctor, as follows: "David A. Fall, Esq., 388 West 7th St., San Pedro, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the proctor for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

FRANCES COOPER

Subscribed and sworn to before me this 21st day of March, 1944.

(Seal) ENES SARVELLO,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: Filed Mar. 23, 1944. Paul P. O'Brien,
Clerk.

No. 10705

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DIESEL SCREW "BETSY ROSS," PETER CEKALOVICH,
DOMINIC MRATINICH and FRANK MULJAT,

Appellants,

vs.

STEVE RULJANOVICH,

Appellee.

Opening Brief for Appellants Diesel Screw "Betsy
Ross," Peter Cekalovich, Dominic Mratinich and
Frank Muljat.

FILED

JUL 3 - 1964

PAUL P. O'BRIEN,
CLERK

HENRY E. KAPPLER,
639 South Spring Street, Los Angeles 14,
Proctor for Appellants.

TOPICAL INDEX.

	PAGE
Jurisdictional statement	1
Statement of the case.....	3
Assignment of errors.....	7
Outline of argument.....	7

I.

This admiralty appeal is a trial de novo.....	8
---	---

II.

A fisherman employed twenty to thirty days prior to the departure of a vessel, who is injured while standing in a warehouse located on land, just prior to the time that a fishing net was to be removed therefrom, is not engaged in the performance of any duties which would entitle him to pursue any maritime remedies, and his sole and exclusive remedy, if any, for injuries sustained at such a time, would be by proceedings before the Industrial Accident Commission of the State of California, pursuant to the provisions of the Labor Code of the State of California.....	8
---	---

III.

A fisherman injured prior to the commencement of the tuna season is not entitled to recover wages beyond the particular season in which he was injured.....	12
Assignment of errors.....	App. p. 1

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Alaska Packers' Association v. Industrial Accident Commission of the State of California, 200 Cal. 579, 253 Pac. 926.....	9, 11, 12
Davis v. Department of Labor, 317 U. S. 249, 87 L. Ed. 175.....	12
Grant Smith-Porter Co. v. Rhode, 257 U. S. 469, 66 L. Ed. 321, 42 S. Ct. 157.....	11
Long v. Seatrain, 127 F. (2d) 878.....	13
Marquina v. S. S. Ipswich, 1931 A. M. C. 225.....	13
Millers' Indemn. Underwriters v. Braud, 270 U. S. 59, 70 L. Ed. 470, 46 S. Ct. 194.....	11
Pell v. American West African Line Inc., 1939 A. M. C. 346....	13
Peninsular and Occidental S. S. Co. v. N. L. R. B., 98 F. (2d) 411	13
Smith & Son v. Taylor, 276 U. S. 179, 72 L. Ed. 520, 48 S. Ct. 228	11
Southern Pacific Company v. Jensen, 244 U. S. 205, 61 L. Ed. 1086, 37 Sup. Ct. 524.....	11
State Industrial Commission v. Nordenholt Corp., 259 U. S. 263, 66 L. Ed. 933.....	11
Sultan Railway Co. v. Dept. of Labor and Industries of the State of Washington, 277 U. S. 135, 72 L. Ed. 820, 48 S. Ct. 505	11
The Bouker No. 2, 241 F. 831.....	12
The Osceola, 189 U. S. 158, 23 Sup. Ct. 43, 47 L. Ed. 760.....	12

STATUTES.

Act of Congress of September 24, 1789, c. 20, Secs. 9, 11, 1 Stat. L. 76, 78, 28 U. S. C. A., Sec. 371.....	3
California Fish and Game Code, Sec. 1065.....	13
Jones Act (46 U. S. C. A. 688).....	1
Judicial Code, Sec. 128a, as amended February 13th, 1925, ef- fective May 13th, 1925 (43 Stat. L. 936, 28 U. S. C. A., Sec. 225)	3

No. 10705

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DIESEL SCREW "BETSY ROSS," PETER CEKALOVICH,
DOMINIC MRATINICH and FRANK MULJAT,

Appellants,

vs.

STEVE RULJANOVICH,

Appellee.

Opening Brief for Appellants Diesel Screw "Betsy
Ross," Peter Cekalovich, Dominic Mratinich and
Frank Muljat.

Jurisdictional Statement.

This is an appeal in admiralty from a final decree entered by the United States District Court for the Southern District of California, Central Division, in an action for wages, maintenance and cure, and for damages pursuant to the provisions of the Jones Act (46 U. S. C. A. 688), all arising out of an injury sustained by the appellee on May 3rd, 1942, while he was standing in the warehouse of the Crescent Warehouse Company, located on Terminal Island in the County of Los Angeles. Appellee had been employed on the day prior to the accident as a seaman-fisherman on the fish boat "Betsy Ross."

The pleadings in the District Court were: A libel *in rem* and *in personam* filed by the libellant Steve Ruljanovich, a second amended libel *in rem* and *in personam* [Ap. 3], claim of Peter Cekalovich, Dominic Mratinich and Frank Muljat [Ap. 10], exceptions to second amended libel [Ap. 14], third amended libel *in rem* and *in personam* [Ap. 19], answer to third amended libel *in rem* and *in personam* [Ap. 26].

After trial, before the court, judgment was ordered in favor of libellant for the sum of \$5,050.46 as wages for the tuna and sardine seasons, for the sum of \$825.00 for maintenance and for the sum of \$94.90 medical expense. Judgment in favor of the respondents in said action was entered with reference to the cause of action predicated upon the Jones Act [Ap. 36].

Findings of fact and conclusions of law were filed on December 23rd, 1943 [Ap. 37]; final decree was entered on December 23rd, 1943 [Ap. 39].

Appellants have appealed from the final decree pursuant to which it is ordered, adjudged and decreed that the libellant recover the sum of \$5,050.46 as wages for the tuna and sardine seasons ending on the 15th day of February, 1943, with interest thereon from February 15th, 1943, at the rate of 7% per annum; and the further sum of \$825.00 as maintenance from May 11th, 1942, to April 5th, 1943, with interest thereon from April 6th, 1943, at the rate of 7% per annum; and the further and additional sum of \$94.90 for medical expenses; and costs of libellant taxed in the sum of \$166.08.

The transcript of the Apostles on Appeal, certified by the Clerk of said District Court, includes the following: Petition for appeal [Ap. 40], order allowing appeal [Ap. 41], notice of appeal [Ap. 42], bond on appeal [Ap. 43],

notice of filing bond on appeal [Ap. 42], citation on appeal [Ap. 2].

The jurisdiction of the District Court over actions, civil and maritime, involving claims for wages and maintenance arises from Article III, Sections 1 and 2 of the United States Constitution, which provide that the judicial power of the United States shall be vested in the Supreme Court and in such inferior courts as Congress may establish, and that such power shall extend to all civil causes of admiralty and maritime jurisdiction.

Jurisdiction of civil causes of admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, c. 20, Secs. 9, 11; 1 Stat. L. 76, 78; 28 U. S. C. A., Sec. 371.

Appeals from final decrees in admiralty are authorized by Section 128a of the Judicial Code, as amended February 13th, 1925, effective May 13th, 1925 (43 Stat. L. 936, 28 U. S. C. A., Sec. 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review, by appeal, final decisions.

Statement of the Case.

On May 3rd, 1942, libellant was employed by Peter Cekalovich as a seaman-fisherman on the fish boat "Betsy Ross." The District Court found that libellant was employed for both the tuna and sardine fishing seasons. The testimony respecting the employment is so brief that appellants set forth this portion of the testimony in full.

Steve Ruljanovich testified as follows:

"Q. What did he (Peter Cekalovich) say to you?

A. He said would I like to go fishing.

Q. What did you say? A. I said, 'Yes, I like to go fishing with you for tuna and sardines, because I

worked in the cannery for the French Sardine, because if you don't give me a chance to fish for sardines I lose my seniority list.'

Q. What did he say? A. He says yes." [Ap. 67-68.]

Peter Cekalovich testified on the subject of employment as follows:

"Q. What did you say to him (Steve Ruljanovich) and what did he say to you? A. I need the man to go fishing with me. I asked him if he wanted to go fishing with me.

Q. What did he say? A. Well, he said he was kind of thinking whether to go or not, because I asked him several times before to come fishing. He said, 'Well, I think I would come, if you keep me on for sardines,' because he figured the tuna season was not so very good, and that is why he wants to be on the sardines.

Q. What did you tell him? A. I told him I never quit anybody that is good on the boat. He could continue to fish with me, if he was willing to come.

Q. Did you tell him he could fish then for both the tuna and the sardines? A. Yes." [Ap. 156-157.]

On the following morning libellant reported to the vessel where it was anchored in a slip in San Pedro. Later on in the morning the vessel was moved to Fish Harbor and the libellant, in company with five or six other members of the crew, proceeded in a truck to the warehouse of the Crescent Warehouse Company where the fish net belonging to the "Betsy Ross" was stored [Ap. 69-70]. It was the purpose of libellant and the other crew members to pick up the net and put it on board the vessel. While libellant was standing inside the warehouse he was struck

on the head by a 4 by 4 timber approximately 16 to 18 feet in length which was located just inside the doorway of the Crescent Warehouse Company [Ap. 717-72]. Libellant sustained certain injuries which required hospitalization.

Although appellee was aboard the "Betsy Ross" from the time that it left its slip in San Pedro until the time that it arrived at Fish Harbor, there is not one scintilla of evidence indicating that appellee ever did any work of any kind or character aboard the vessel. The record is barren of any testimony which indicates that the appellee did anything at the Crescent Warehouse Company.

After the accident it was between twenty to thirty days before the vessel put out to sea [Ap. 255].

On or about January 19th, 1943, libellant filed in the Industrial Accident Commission of the State of California an application for the adjustment of compensation pursuant to the provisions of the Labor Code of the State of California, in connection with the injury and disability which he sustained on May 4th, 1942 [Ap. 63-65]. Thereafter a hearing was had before the Industrial Accident Commission of the State of California, at which time testimony was taken and an award for compensation made to libellant. A copy of the findings and award of the Industrial Accident Commission is set forth in the Apostles at pages 276-277. One of the findings of fact of the said Commission is as follows:

"Said employee at the time of the injury was not engaged in work in connection with his occupation as a seaman and said injury did not occur on a vessel or on navigable waters outside of the State of California but within the boundaries of the State of California and therefore this Commission has jurisdiction in this proceeding." [Ap. 276-277.]

Since the trial of the present action, the said award of the Industrial Accident Commission has been annuled by the Supreme Court of the State of California. At the time of the writing of this brief, however, the time within which a petition for a rehearing in the Supreme Court of the State of California could be filed has not as yet expired and likewise the time within which the Industrial Accident Commission might apply to the Supreme Court of the United States for a Writ of Certiorari has not expired. Under the circumstances, therefore, the action of the appellate courts of the State of California is not as yet final.

There is evidence that the 1/17th share of the catch for both the tuna and sardines seasons would amount to \$5,050.46 [Ap. 161-162]. Libellant introduced no evidence indicating how much of the said amount was referable to the tuna season or how much was referable to the sardine season.

Upon the foregoing evidence the District Court found that the libellant entered into his duties as a member of the crew of the "Betsy Ross" on May 4, 1942, and that while engaged in the service of the ship and while doing his duty and obeying the commands of the master of the "Betsy Ross," libellant was struck on the head with a heavy timber while at a warehouse located on Terminal Island, at the Port of Los Angeles, for the purpose of bringing the ship's net from the said warehouse to the "Betsy Ross" and that by reason of the foregoing the Court had jurisdiction and the libellant was entitled to the sum of \$5,050.46 as wages for the tuna and sardine seasons ending on the 15th day of February, 1943, the sum of \$825.00 as maintenance from May 11th, 1942, to April 5th, 1943, and the sum of \$94.90 for medical expense.

Assignment of Errors.

The assignment of errors upon which appellants rely are set forth in the Appendix to this brief and are summarized in the following statement of points involved in the appeal of said appellants:

1. This appeal in admiralty is a trial *de novo*.
2. The District Court erred in finding that the subject matter of the first and second causes of action, or either of them, set forth in the third amended libel, was within the admiralty jurisdiction of the United States District Court, for the reason that the exclusive remedy of the libellant was and is within the exclusive jurisdiction of the Industrial Accident Commission of the State of California.
3. Under the general maritime law is a fisherman-seaman, engaged for the tuna and sardine fishing seasons, entitled to recover wages for both of said seasons where his injury occurs prior to the commencement of either season or in any event prior to the commencement of the second season?

Outline of Argument.

- I. This admiralty appeal is a trial *de novo*.
- II. A fisherman employed twenty to thirty days prior to the departure of a vessel, who is injured while standing in a warehouse located on land, just prior to the time that a fishing net was to be removed therefrom, is not engaged in the performance of any duties which would entitle him to pursue any maritime remedies, and his sole and exclusive remedy, if any, for injuries sustained at such a time, would be by proceedings before the Industrial Accident Commission of the State of California, pursuant to the provisions of the Labor Code of the State of California.
- III. A fisherman injured prior to the commencement of the tuna season is not entitled to recover wages beyond the particular season in which he was injured.

I.

This Admiralty Appeal Is a Trial de Novo.

No citation of authority is necessary to establish the contention that an admiralty appeal to the Circuit Court of Appeals is a trial *de novo*.

II.

A Fisherman Employed Twenty to Thirty Days Prior to the Departure of a Vessel, Who Is Injured While Standing in a Warehouse Located on Land, Just Prior to the Time That a Fishing Net Was to Be Removed Therefrom, Is Not Engaged in the Performance of Any Duties Which Would Entitle Him to Pursue Any Maritime Remedies, and His Sole and Exclusive Remedy, if Any, for Injuries Sustained at Such a Time, Would Be by Proceedings Before the Industrial Accident Commission of the State of California, Pursuant to the Provisions of the Labor Code of the State of California.

The evidence indicates, without dispute, that on May 3rd, 1942, the libellant was employed as a fisherman aboard the "Betsy Ross." The vessel was not ready for immediate departure on the day of the libellant's injury because the net had to be procured and work had to be done thereon. It was approximately twenty to thirty days thereafter before the vessel put out to sea for the purpose of fishing for tuna [Ap. 255]. The record is barren of any evidence indicating that the libellant performed any duty, prior to the time of his injury, which was ordinarily performed by a fisherman-seaman. It is also barren of any testimony showing that libellant had done anything other than to accompany the vessel from San Pedro to Terminal Island,

at which point he got in a truck and rode to the warehouse along with several other members of the crew.

It is the contention of the appellants that the workmen's compensation laws of the State of California are applicable to the injuries sustained by the libellant, if he was injured while in the service of the vessel, for the reason that those laws may be invoked without in the slightest degree interfering with the harmony and uniformity of admiralty law. The point was preserved by appellants by appropriate exceptions filed to the second amended libel [Ap. 14-18] and by objection at the time of trial [Ap. 61-62].

The case at bar cannot be distinguished, factually or otherwise, from the case of *Alaska Packers' Association v. Industrial Accident Commission of the State of California*, 200 Cal. 579, 253 P. 926. In that case the Supreme Court of the State of California affirmed an award of workmen's compensation made by the respondent Commission, which judgment was later affirmed by the Supreme Court of the United States (276 U. S. 467, 72 L. Ed. 656). One Peterson entered the employ of the petitioner, Alaska Packers' Association, as a seaman-fisherman, shipping from San Francisco to Alaska. On arrival in Alaska he was taken with the rest of the crew to one of the employer's canneries and put to work repairing nets and overhauling the fishing boats preparatory to the commencement of the fishing season. During the season he worked as a seaman-fisherman on the boats. At the close of the season Peterson, while standing on shore attempting to launch a stranded boat for the purpose of storing it for the winter, was injured, for which injury he was awarded compensation by the California Industrial Accident Commission.

With respect to the nature of Peterson's employment, the Supreme Court of the State of California said (200 Cal. p. 581, 253 P. 927):

"Peterson's contract with the petitioner was undoubtedly maritime in its nature. (Cases cited.) We do not regard the fact that the employee worked at mending nets, performed services in loading and unloading lighters carrying the cargo to the ship, and, part of the time while the vessel was in Alaska, slept on shore, as qualifying in any way the nature of his contract, or rendering it severable. Generally speaking, parties entering into maritime contracts contemplate the system of maritime law, and its well-known rules control their rights and liabilities, to the exclusion of state statutes. (Union Fish Co. v. Erickson, 248 U. S. 308 (63 L. Ed. 261, 39 Sup. Ct. Rep. 112; see also Rose's U. S. Notes).) But, as to certain local matters, regulation of which will work no material prejudice to the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations, the rules of the maritime law may be modified or supplemented by state regulation."

The Supreme Court of the United States affirmed the judgment of the Supreme Court of California (276 U. S. 467, 72 L. Ed. 656) and said, with respect to Peterson's employment:

"When injured, certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. *The work was really local in character.*" (Emphasis ours.)

The leading case on the subject, of course, is *Southern Pacific Company v. Jensen*, 244 U. S. 205, 61 L. Ed. 1086, 37 Sup. Ct. 524, decided in 1916, wherein it was held that the jurisdiction of the federal courts in civil cases of admiralty and maritime jurisdiction is not exclusive, and states may enact legislation affecting the rights of persons employed pursuant to maritime contracts as long as the state legislation does not contravene the essential purpose expressed by an act of Congress or work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations. The decision of the Supreme Court in the *Alaska Packers'* case, *supra*, was written in 1928, many years after the decision in the *Jensen* case, *supra*. For other cases sustaining the jurisdiction of the Industrial Accident Commission of the State of California, see:

Grant Smith-Porter Co. v. Rhode, 257 U. S. 469, 66 L. Ed. 321, 42 S. Ct. 157;

State Industrial Commission v. Nordenholt Corp., 259 U. S. 263, 66 L. Ed. 933;

Millers' Indemn. Underwriters v. Braud, 270 U. S. 59, 70 L. Ed. 470, 46 S. Ct. 194;

Smith & Son v. Taylor, 276 U. S. 179, 72 L. Ed. 520, 48 S. Ct. 228;

Sultan Railway Co. v. Dept. of Labor and Industries of the State of Washington, 277 U. S. 135, 72 L. Ed. 820, 48 S. Ct. 505.

It is respectfully submitted that the work which the libellant was doing was purely local in character, and was work which could have been done by anyone whether employed as a seaman or not and under the circumstances the

jurisdiction of the Industrial Accident Commission was exclusive since no showing could be made that such application would work any material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law. So far as appellants can ascertain, the Supreme Court of the United States *has never seen fit to overrule its decision in the Alaska Packers' case, supra*. Furthermore, under the recent case of *Davis v. The Department of Labor*, 317 U. S. 249, 87 L. Ed. 175, the Court indicates that full weight should be given to a presumption of the constitutionality of the workmen's compensation laws of a state, and particularly is this true where the facts, as here, bring the case within the rule laid down by the *Alaska Packers' Association case, supra*, and within the exceptions expressed by the Supreme Court in the *Jensen* decision, *supra*.

III.

A Fisherman Injured Prior to the Commencement of the Tuna Season Is Not Entitled to Recover Wages Beyond the Particular Season in Which He Was Injured.

Without conceding that the District Court had jurisdiction in this case, appellants assert that the Court erred in finding that the libellant was entitled to recover wages for both the tuna and sardine fishing seasons.

It has long been the rule that a seaman injured in the service of the ship may recover from the owners of the vessel maintenance and cure and *wages to the end of the voyage*. (*The Osceola*, 189 U. S. 158, 23 Sup. Ct. 43, 47 L. Ed. 760; *The Bouker No. 2*, 241 F. 831.) Although the right to maintenance and a reasonable cure might extend beyond the particular voyage involved, the general

rule seems to be that the right to wages terminates with the end of the voyage. See *Marquina v. S. S. Ipswich*, 1931 A. M. C. 225 *Peninsular and Occidental S. S. Co. v. N. L. R. B.*, 98 F. (2d) 411; *Pell v. American West African Line Inc.*, 1939 A. M. C. 346; *Long v. Seatrain*, 127 F. (2d) 878.

In connection with a seaman fishing on a share basis, the voyage can only be held to be co-extensive with the particular season in which the seaman was engaged at the time he sustained his injury. Obviously the libellant could not have been performing any service or any contract with reference to the sardine season for the reason that pursuant to the laws of the State of California it would have been unlawful to fish sardines prior to August 1st, 1942. (*California Fish and Game Code*, Sec. 1065.)

In its inception the right to recover wages to the end of the voyage must have been based upon the proposition that since the seaman had been incapacitated while on board the vessel it would be unfair to him to put him off the vessel at the end of the voyage without giving him his wages where he had been prevented from fulfilling his duties as a seaman by reason of his incapacity and where he had actually been on the vessel throughout the entire voyage.

If the Court holds, however, that a fisherman, fishing on a share basis and employed for a definite period of time as, for example, ten seasons, is entitled to his maintenance and cure for the period of his injuries and in addition is entitled to recover wages for the period of *his employment*, the Court will have departed from the broad equitable rules which have always governed the courts of admiralty. Since libellant introduced no evidence with reference to the amount of the share earned during the tuna season

and the amount earned during the sardine season, it is submitted that the libellant failed in his proof on the issue of the amount of wages to which he may have been entitled and that this Court should either reverse the decree or order the taking of testimony upon this issue so that the libellant would be awarded only that proportion of the catch which was referable to his 1/17th share of the proceeds of the tuna season.

It is respectfully submitted that the Court had no jurisdiction of the cause. In any event, it is submitted that the libellant is entitled to recover only his share of the catch for the particular season in which he sustained his injury.

Dated Los Angeles, California, June 30, 1944.

HENRY E. KAPPLER,

Proctor for Appellants.

APPENDIX.

Assignment of Errors.

Now come the respondents and claimants, and each thereof, and hereby assign the following errors in the above entitled proceedings:

I.

The District Court erred in finding that the subject matter of the first cause of action set forth in the third amended libel was within the Admiralty jurisdiction of the United States District Court, for the reason that the exclusive remedy of the libellant was and is within the exclusive jurisdiction of the Industrial Accident Commission of the State of California or the United States Employees' Compensation Commission.

II.

The District Court erred in finding that the subject matter of the second cause of action set forth in the third amended libel was within the Admiralty jurisdiction of the United States District Court, for the reason that the exclusive remedy of the libellant was and is within the exclusive jurisdiction of the Industrial Accident Commission of the State of California or the United States Employees' Compensation Commission.

III.

The District Court erred in finding that the libellant was disabled from May 4th, 1942, to and including April 5th 1943.

IV.

The District Court erred in concluding that the libellant was entitled to the sum of \$94.90, or any other sum in excess of the sum of \$33.00, as or for medical care or attention or medicines.

V.

The District Court erred in finding that the reasonable expenses incurred by the libellant for his support from May 11, 1942, to April 5, 1943, amounted to the sum of \$2.50 per day, or any other sum per day in excess of the sum of \$1.25.

VI.

The District Court erred in concluding that the libellant was entitled to recover the sum of \$825.00 as and for maintenance.

VII.

The District Court erred in finding that the libellant was entitled to recover the sum of \$5,050.46, for a 1/17th lay or share of the catch for both the Tuna and Sardine fishing seasons, when the evidence was undisputed that the libellant sustained his injuries prior to the commencement of the Tuna season.

VIII.

The District Court erred in finding that the libellant was entitled to a 1/17th lay or share of the fish caught and sold during the Sardine season.

IX.

The District Court erred in refusing to find that the award made in favor of the libellant in the proceedings commenced before the Industrial Accident Commission of the State of California, was a bar to libellant's first and second causes of action in the third amended libel in the United States District Court.

X.

The District Court erred in finding that the libellant was entitled to any maintenance whatever for any period of time whatever.

XI.

The District Court erred in finding that the libellant was injured while in the service of the ship.

XII.

The District Court erred in finding that the libellant is a seaman within the designation of persons permitted to sue without furnishing bond for or prepayment of or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Section 837, U. S. C. A.

XIII.

The District Court erred in finding that all and singular the premises are true and within the Admiralty and Maritime jurisdiction of said Court.

XIV.

The District Court erred in finding that the Diesel Screw "Betsy Ross" engaged in fishing from on or about the 4th day of May, 1942, to on or about the 15th day of February, 1943.

XV.

The District Court erred in finding that on or about the 3rd day of May, 1942, the Diesel Screw "Betsy Ross" was destined for a nine months Tuna and Sardine fishing seasons.

XVI.

The District Court erred in finding that the libellant was entitled to any sum whatsoever upon either the first or second causes of action set forth in the third amended libel.

XVII.

The District Court erred in finding that the libellant was entitled to a decree against the respondents and claimants,

or any of them, in the sum of \$5,050.46, or any other sum whatsoever or at all, upon the second cause of action set forth in the third amended libel.

XVIII.

The District Court erred in finding that the libellant was entitled to recover the sum of \$919.90, or any other sum whatsoever or at all, upon the first cause of action set forth in the third amended libel.

XIX.

The District Court erred in not concluding that the libellant was not entitled to recover any sum whatsoever or at all from the respondents and claimants, or any of them, and in not concluding that the third amended libel should be dismissed with costs in favor of the respondents and claimants [Ap. 48-51].

No. 10705.

3

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DIESEL SCREW "BETSY ROSS," PETER
CEKALOVICH, DOMINIC MRATINICH and
FRANK MULJAT,

Appellants and Cross-Appellees,

vs.

STEVE RULJANOVICH,

Appellee and Cross-Appellant.

**BRIEF OF APPELLEES ON CROSS APPEAL
OF STEVE RULJANOVICH.**

HENRY E. KAPPLER,

639 South Spring Street, Los Angeles 14,

Proctor for Cross-Appellees.

FILED

JUL - 7 1944

TOPICAL INDEX.

	PAGE
Preliminary statement	1
Cross-appellees' reply to cross-appellant's contentions.....	2
Conclusion	11

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Baltimore & Ohio etc. Co. v. Carroll, 280 U. S. 491, 74 L. Ed. 566	10
De Zon v. American President Lines, 218 U. S. 669, 87 L. Ed. 1065	10
Foster v. Conrad, 261 F. 603.....	11
Gorman Leonard Coal Co. v. Peninsular State Corp., 66 F. (2d) 83	2
Haan v. Darnell, 246 F. 943.....	11
Jamison v. Encarnacion, 281 U. S. 639, 74 L. Ed. 1084, 30 NCCA 197	10
Lehigh etc. Coal Co. v. Sawickas, 247 Fed. 432.....	11
Seaboard A. L. R. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062	10
Siciliano v. Calif. Sea Products Co., 44 F. (2d) 784.....	2
The Adriana, 6 F. (2d) 860.....	2
The District of Columbia, 74 F. (2d) 977.....	2
The Ellenville, 40 F. (2d) 47.....	2
The Mabel, 61 F. (2d) 537.....	2
Voljkovich v. Ursich, 49 Cal. App. (2d) 268.....	10
Wandtke v. Anderson, 74 F. (2d) 381.....	2

STATUTES.

Jones Act (46 U. S. C. A. 688; Ap. 22-24).....	1
--	---

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IN THE

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Appellants and Cross-Appellees,

vs.

STEVE RULJANOVICH,

Appellee and Cross-Appellant.

BRIEF OF APPELLEES ON CROSS APPEAL OF STEVE RULJANOVICH.

Preliminary Statement.

Cross-appellant, Steve Ruljanovich, set forth in the third amended libel a third cause of action predicated upon the provisions of the Jones Act (46 U. S. C. A. 688; Ap. 22-24). After a trial the District Court found that the said Steve Ruljanovich was not entitled to any recovery by reason of his third cause of action. (Ap. 35.) A decree was therefore entered in favor of the cross-appellees on said third cause of action (Ap. 39).

There is only one question presented for decision: Does the evidence indicate that the cross-appellees were, or any of them was, guilty of any negligent act or omission as a matter of law, which proximately caused the injuries sustained by the cross-appellant?

Cross-Appellees' Reply to Cross-Appellant's Contentions.

I.

The law, of course, is well settled that an appeal or cross-appeal to the Circuit Court of Appeals in an admiralty case is a trial *de novo*.

This statement, however, is subject to the important qualification that the Circuit Court of Appeals will not disturb the findings of the trial court unless there is plain and manifest error in the findings. The mere fact that the Circuit Court of Appeals might reach a different conclusion on the same set of facts is of no importance, if the findings have support in the evidence. (*The Mabel* (C.C.A. Cal.) 61 F. (2d) 537; *Wandtke v. Anderson* (C.C.A. Cal.) 74 F. (2d) 381.)

It is also well settled that where the evidence is conflicting there is a presumption of the correctness of the findings of fact by the trial court who has seen and heard the witnesses. The burden before the appellate court is on the appellant to overcome such a presumption (*The Adriana*, 6 F. (2d) 860; *The District of Columbia*, 74 F. (2d) 977; *The Ellenville*, 40 F. (2d) 47). It has been said that the trial judge passes upon the credibility of the witnesses and that his findings are entitled to great weight, particularly where the evidence is conflicting (*Siciliano v. Calif. Sea Products Co.* (C.C.A. Cal.) 44 F. (2d) 784; *Gorman Leonard Coal Co. v. Peninsular State Corp.*, 66 F. (2d) 83.)

II.

Cross-appellant asserts that the evidence is conclusive upon the proposition that his injury occurred by reason of the negligent act of the respondent Frank Muljat. Cross-appellant then purports to set forth *all* of the evidence upon this subject. Brief excerpts are then taken from the testimony of the witness Gibson and the witness Muljat.

The cross-appellant has not, by any stretch of the imagination, set forth all of the testimony bearing upon the subject of the alleged negligence of the respondent Muljat and he has likewise failed to set forth any of the reasonable inferences which might justifiably be drawn by the trial court from the testimony of the various witnesses.

It is asserted by the cross-appellant that the witness Neal D. Gibson was a *disinterested* witness. That this is far from the truth is demonstrated by the record. Furthermore, the trial judge saw and heard Gibson testify and was in a position to accurately evaluate his testimony. Gibson was the warehouse foreman employed by the Crescent Warehouse Company (Ap. 142), whose negligence is alleged in the third amended libel to have co-joined with that of the respondent Muljat to cause the injuries of which libellant complained in said third amended libel. In the verified third amended libel, the cross-appellant alleged:

“That the said accident, as set forth in paragraph Third of libellant’s First Cause of Action, and made a part hereof by reference, was caused, without any

contributing fault or neglect on the part of libellant, and as a proximate result of the combined negligence of the Crescent Warehouse Company, and the negligence of Frank Muljat, part owner and member of the crew of the Diesel Screw 'Betsy Ross,' * * *." (Ap. 23.)

The record further demonstrates that the libellant had commenced a civil action at law for damages, in the Superior Court of the State of California, in and for the County of Los Angeles, Long Beach Division thereof, against the Crescent Warehouse Company, in connection with the identical injuries which are the subject matter of this litigation (Ap. 184). The record does not indicate that this action against the Crescent Warehouse Company has ever been disposed of and proctor for cross-appellant will not deny to this Honorable Court that this action is still pending before the courts of the State of California. Under the circumstances, therefore, it seems most strange that Gibson could be called a disinterested witness when everything that he would testify to would be calculated to exculpate himself and his employer from a charge of negligence.

The libellant has merely set forth a fragment of Gibson's testimony. A careful analysis of Gibson's testimony indicates the following, with reference to the physical conditions at the place of the accident:

1. That a 16 to 18 foot 4 by 4 timber had been allowed to remain against the wall of the warehouse owned by the Crescent Warehouse Company for at least a month before the accident. (Ap. 142.)

2. That this timber was almost parallel with the wall—that its base was approximately a foot and a half from the wall. (Ap. 142.)

3. His testimony in conjunction with Respondents' Exhibit A which was a photograph of the interior of the warehouse, indicates that the 4 by 4 which fell was within a foot or so of an almost identical 4 by 4 which was fastened to the wall and which was a part of the permanent structure comprising the warehouse. (Ap. 144.)

4. The particular 4 by 4 in question had not been fastened either at the top or the bottom and was held in place by gravity alone. (Ap. 144.)

5. That it was dark at the place where the timber was located. (Ap. 148-149.)

On his direct examination, Gibson testified with reference to the conduct of Frank Muljat, in part, as follows:

"Q. When this man got up on the truck what, if anything, did he do with his left hand? A. With his left hand he sort of assisted himself by taking hold of this 4 by 4.

Q. What happened to the 4 by 4 then? A. *He immediately pulled on it*, setting it in motion, and it fell over." (Ap. 140.)

On cross-examination, however, the same witness testified as follows:

"Q. You *saw* him pull that 4 by 4 as he got up on the truck? A. I saw the 4 by 4 move. *I couldn't see him, as to any pulling*, but I saw the 4 by 4 move when he did it." (Ap. 147.)

We have a witness therefore who in one breath says that he saw Muljat pull on the 4 by 4 and in the next breath says that he couldn't see him as to any pulling. The statement that he saw the 4 by 4 move when he "did it" does not have reference, it is submitted, to any

possible pulling on the timber, since the witness testified that he could not see him pull on the timber, but has reference to the act of getting up on the truck.

It is obvious that Gibson assumed that because the 4 by 4 fell as Muljat was getting up on the truck that he must of necessity have pulled it over.

Muljat, as well as all of the other fishermen, were strangers on the premises and were all invitees of Gibson and the Crescent Warehouse Company. At no time did Gibson or anyone connected with the Crescent Warehouse Company warn Muljat or any of the seamen that the 4 by 4 was not affixed to the premises. (Ap. 148.)

That Gibson appreciated the danger, however, involved in the timber's presence because of his superior knowledge of its presence and the fact that it was not fastened and was loose, is indicated by the following testimony:

“Q. Prior to the time he (Muljat) jumped up onto the truck you saw he was pretty close to the end of the concrete dock there, didn't you? A. Yes, sir.

Q. Did you yell out a warning to anybody? A. I yelled, ‘Look out!’

Q. Did you warn this crew member before he attempted to get up onto the truck, that there was a loose 4 by 4 standing there right next to his member that allows the sliding door to go up and down? A. No, sir; I did not think he had no business on there until the truck was ready for him to put on the net.

Q. In other words, you never at any time warned anyone of the fact that this timber was not fastened in the right manner? A. No, sir, I did not have time to.” (Ap. 148.)

The crux of the entire matter is indicated by Gibson's testimony as follows:

“Q. Before you opened the door, of course, the truck was on the outside, and you made no effort at that time to attempt to move this 4 by 4 timber, did you? A. No, sir; *it was dark in there; I couldn't even see it, in fact.*

Q. You couldn't even see it? A. Not very plain.

Q. Despite the fact, however, that you knew it had been there a considerable period of time? A. *It had been there so long that I had forgot about it.*” (Ap. 148-149.)

If the Court will examine the photographs which are in evidence as Respondents' Exhibits B, C and D, it will be apparent that the 4 by 4, when viewed by a person unfamiliar with the premises, was to all intents and purposes a part of the solid structural frame work of the building. The Court should also keep in mind the fact that the photographs were obviously taken with a flash bulb and at a time when there was a maximum amount of light, whereas the testimony of Gibson indicates that the 4 by 4 could not be plainly seen.

The testimony of Muljat does not indicate that he ever touched the timber in question. Muljat testified as follows:

“I jumped on the truck. I don't recall whether I place my hand against the wall or not. If I did, I didn't see any timber there; and I just jumped on the truck.” (Ap. 198.)

There is nothing in the foregoing testimony which would charge the respondent Muljat with any negligence or which would at all indicate that he was responsible for the fall of the timber.

Much is made by cross-appellant of the purported admission of the respondent Muljat. He testified, in part, as follows:

“I don’t recall putting my hand against the wall, but since I got on the truck I *thought* maybe that would be the only reason the thing fall, and I did say maybe it was my fault the plank fall, *I thought*. That was all I said.” (Ap. 200.)

An analysis shows that although Muljat didn’t know whether he touched the timber, he concluded from the mere fact that the timber fell almost coincidentally with his jumping on the truck, that *he must have had something to do with its falling*. The admission was made in the car, at a time when the cross-appellant was bleeding profusely and when everybody was excited and concerned about his welfare.

Furthermore, cross-appellant has refrained from setting forth *any* of the testimony of the witness Nick Karuza, who was certainly more disinterested than the witness Gibson and who was watching the conduct of both Gibson and Muljat at the time of the accident. Karuza testified, in part, as follows:

“Q. Did you observe Mr. Gibson get up on the truck? A. Yes, I saw him.

Q. At that time, would you tell me where Mr. Muljat was? A. He first jumped, Mr. Gibson; then Mr. Muljat followed right away in the same truck after him.

Q. You mean by that that Mr. Gibson jumped up on the body of the truck, and Mr. Muljat followed him immediately? A. Yes.

* * * * *

Q. By Mr. Kappler: How did he (Gibson) get up onto the truck? A. When he jumped he touched the corner with his hand.

Q. He touched the corner with his left hand? A. His left hand, yes, when he jumped.

Q. How did Mr. Muljat get up onto the body of the truck? A. The same thing, both; he followed him.

Q. The same thing Mr. Gibson did? A. Yes.”
(Ap. 192-193.)

From the foregoing it is apparent that Gibson jumped up onto the truck and that Muljat immediately followed in the same manner. This, of course, is in direct conflict with the testimony of Gibson as to the manner in which he got up onto the truck.

The truck driver, who is not shown to have been a member of the crew of the “Betsy Ross” or in any manner connected with the cross-appellees, had difficulty in backing the truck into the warehouse. (Ap. 138.) Respondent Muljat testified that the truck hit the side of the building. An examination of the photographs introduced in evidence by respondents reveal numerous marks on the concrete at the entranceway to the building and it is entirely possible that the timber may have been caused to fall by reason of the fact that the truck struck the building, and jarred the timber away from its position up against the wall.

Cross-appellant assumes that Muljat pulled the timber over. It is submitted that the record is in conflict on this proposition and that the trial court was amply justified in concluding that Muljat did not pull the timber over.

In any event, cross-appellees insist that even if it be assumed that Muljat pulled the timber over, this would not establish that Muljat was guilty of negligence.

“Damages may be recovered under the Jones Act only for negligence.”

De Zon v. American President Lines, 218 U. S. 669 at 671, 87 L. Ed. 1065 at 1073;

Jamison v. Encarnacion, 281 U. S. at 639, 74 L. Ed. 1084, 30 NCCA 197.

Negligence is the failure to exercise ordinary care under the circumstances. Can this court say, as a matter of law, that the cross-appellee Muljat, even if he did pull the timber over, did not act as a reasonably prudent person under the circumstances, particularly where no one had warned him that the timber, almost three times the height of an ordinary man, was not affixed in some manner to the building, where the evidence indicates that the 4 by 4 timber appeared to all intents and purposes to be a part and parcel of the structure itself?

It is settled law that under the Jones Act the employer is not held absolutely responsible to furnish employees with a safe place in which to work but is only bound to exercise reasonable care to see that the place is reasonably safe. (*Voljkovich v. Ursich*, 49 Cal. App. (2d) 268; *Baltimore & Ohio etc. Co. v. Carroll*, 280 U. S. 491, 74 L. Ed. 566; *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062.

The evidence, of course, is undisputed that the cross-appellees merely stored the fishing net on the premises of the Crescent Warehouse Company. As invitees on the premises they were entitled to assume that the Crescent Warehouse Company had not been guilty of negligence

in and about the maintenance of the premises which would be likely to cause injury to the respondents or any of the other invitees. The respondents were not in control of the premises and would have no power to take steps of their own in order to attempt to in any manner change the condition of the premises. The general rule is that a master is not liable for injuries to his servant by reason of defects in appliances or places of work which are furnished by or are under the control of a third person. (*Foster v. Conrad*, 261 F. 603; *Lehigh etc. Coal Co. v. Sawickas*, 247 F. 432; *Haan v. Darnell*, 246 F. 943.)

Conclusion.

It is respectfully submitted that the trial court was amply justified in concluding that the cross-appellee, Frank Muljat, was not guilty of any negligent act or omission proximately causing any injury to the cross-appellant. This Court, applying the well established rules on admiralty appeals, should not disturb the findings of fact of the trial court which are amply supported by the evidence.

It is respectfully submitted that the decree should be affirmed.

Dated, Los Angeles, California.

HENRY E. KAPPLER,

Proctor for Cross-Appellees.

No. 10705

IN THE

United States Circuit Court of Appeals

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Appellants and Cross-Appellees,

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STEVE RULJANOVICH,

Appellee and Cross-Appellant.

BRIEF OF APPELLEE.

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FILED

JUL 21 1944

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TOPICAL INDEX.

	PAGE
Preliminary statement	1
Point I. Can the State of California deprive a seaman of his rights to wages, maintenance and cure?.....	2
Point II. Is a seaman entitled to his wages for the term of his employment, when injured during that term, and is unable to participate in the remainder thereof?.....	4
Conclusion	5

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Aguilar v. Standard Oil Co., 318 U. S. 724, 63 S. Ct. 930, 87 L. Ed. 1107.....	2
Cortes v. Baltimore Insular Lines, 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368.....	3
Enochasson v. Freeport Sulphur Co., 7 F. (2d) 674, 1925 A. M. C. 1203.....	4, 5
Harden v. Gordon, 2 Mason 541, Fed. Case No. 6,047.....	3
Long Street v. Steamboat R. R. Springs, 4 F. 671.....	4, 5
Luksich v. Missetich, 140 Fed. (2d) 812.....	4
Mason v. Evanisevich, 131 F. (2d) 858.....	5
McCarron v. Dominion Atlantic R. Co., 134 F. 762.....	5
Norton v. Warner, U. S., 64 S. Ct. 747, 88 L. Ed. 606	2
Occidental Indemnity Co. v. Industrial Accident Commission, 24 Adv. Cal. Dec. 305, 1944 A. M. C. 102, affirming 61 A. C. A. 503, 143 Pac. (2d) 58.....	2
O'Donnell v. Great Lakes Dredge & Dock Co., 318 U. S. 36, 63 S. Ct. 488, 87 L. Ed. 596.....	2, 4
Olsen v. Whitney, 109 F. 80.....	5
Pacific Mail S. S. Co. v. Lucas, 264 Fed. 938.....	4
Serio v. Ivan, 1944 A. M. C. 409.....	5
Smith & Son v. Taylor, 276 U. S. 179, 72 L. Ed. 520, 48 S. Ct. 228	2
Strom v. M/V Montague, 1944 A. M. C. 122.....	5
Sultan Railway Co. v. Dept. of Labor and Industries of State of Washington, 277 U. S. 135, 72 L. Ed. 820, 48 S. Ct. 505....	3
The Osceola, 189 U. S. 158, 47 L. Ed. 760.....	3

TEXTBOOKS.

1 Benedict, 6th Ed. 61.....	3
-----------------------------	---

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DIESEL SCREW "BETSY ROSS," PETER CEKALOVICH,
DOMINIC MRATINICH and FRANK MULJAT,
Appellants and Cross-Appellees,

vs.

STEVE RULJANOVICH,
Appellee and Cross-Appellant.

BRIEF OF APPELLEE.

Preliminary Statement.

There are two questions presented for decision by the appeal of the Diesel Screw "Betsy Ross," Peter Cekalovich, Dominic Mratinich and Frank Muljat.

First: Is a seaman, injured in the course of his service to his vessel, occurring on land, subject to the Workmen's Compensation Act of the State of California, or are his remedies confined to maintenance, cure and wages, under the Laws of Admiralty?

Second: Is a seaman entitled to recover his wages for the period of his employment when injured during that period and rendered unable to return to his employment at anytime during that period?

POINT I.

Can the State of California Deprive a Seaman of His Rights to Wages, Maintenance and Cure?

This question has been definitely settled by the United States Supreme Court in the cases of *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 63 S. Ct. 488, 87 L. Ed. 596, *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 63 S. Ct. 930, 87 L. Ed. 1107, and *Norton v. Warner*,U. S., 64 S. Ct. 747, 88 L. Ed. 606. So conclusive are these decisions, there can be no room left for argument.

It seems of outstanding importance and significance that appellant's counsel represented the Occidental Indemnity in the matter of *Occidental Indemnity Co. v. Industrial Accident Commission*, 24 Advance California Decisions 305, 1944 A. M. C. 102 (affirming 61 A. C. A. 503), 143 Pac. (2d) 58 in the matter in which the Supreme Court of the State of California determined that the rights of appellee were confined to maritime jurisdiction, and that this case "falls clearly within the reasoning in the O'Donnell and Aguilar cases * * *.", and that the Industrial Accident Commission of the State of California had no jurisdiction in the matter.

The cases cited by appellants on page 11 of their opening brief have been adequately disposed of and explained in the case of *Occidental Indemnity Co. v. Industrial Accident Commission*, *supra*, excepting *Smith & Son v. Taylor*, 276 U. S. 179, 72 L. Ed. 520, 48 S. Ct. 228, and

Sultan Railway Co. v. Dept. of Labor and Industries of the State of Washington, 277 U. S. 135, 72 L. Ed. 820, 48 S. Ct. 505. The first of these cases involved the claim of a longshoreman who fell from a staging, extending from the dock, while engaged in unloading a boat. The second involved a log handler injured while engaged in placing logs in booms on navigable waters of the United States. Neither case supports the contention of appellant that the State of California can deprive a seaman, *injured in the service of his ship*, of his right to maintenance, cure and wages.

A seaman's right to maintenance and cure is implied in *his contract of employment*.

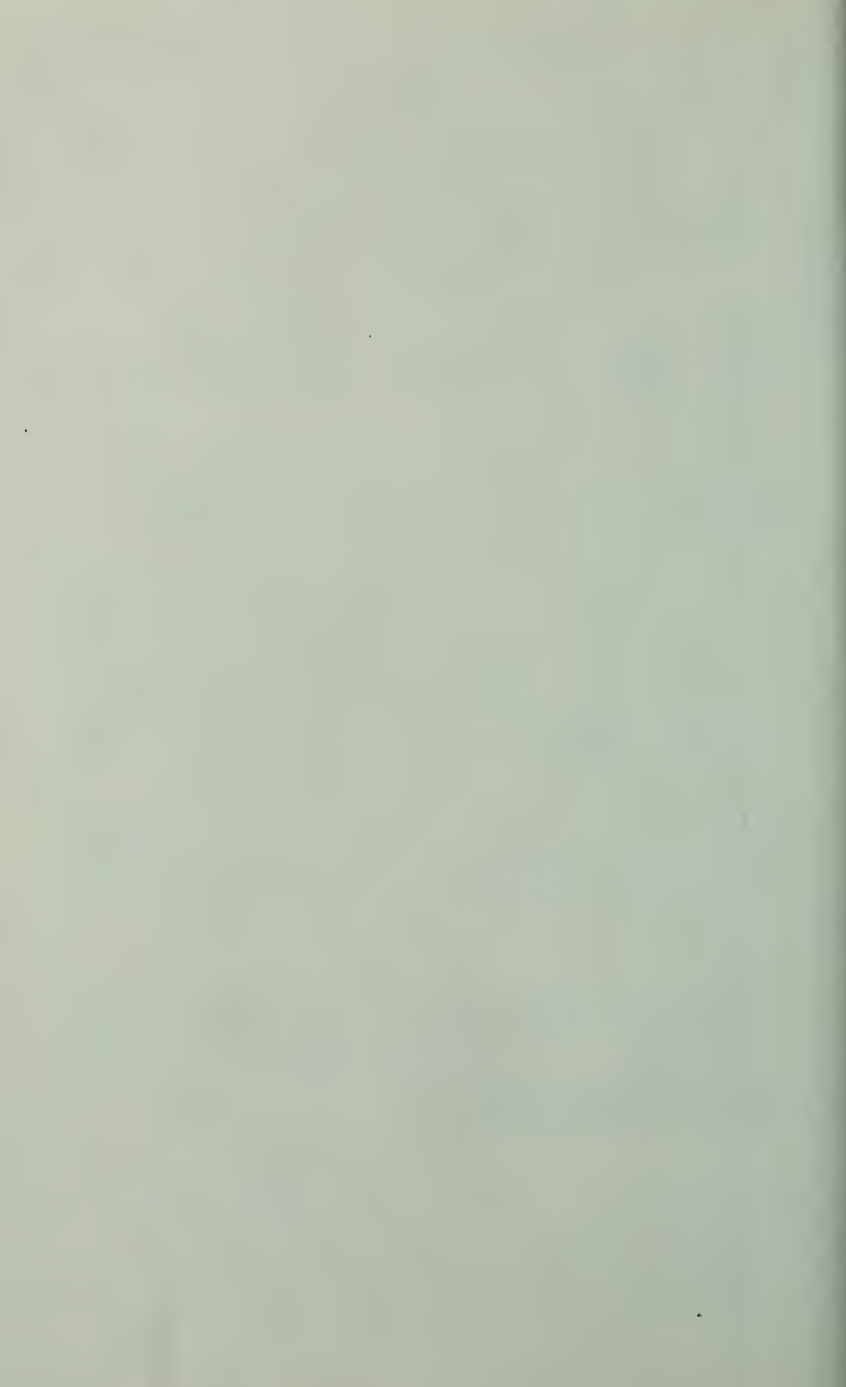
The Osceola, 189 U. S. 158 (at 172), 47 L. Ed. 760 (at 763);

Harden v. Gordon, 2 Mason 541—Fed Case No. 6,047;

Cortes v. Baltimore Insular Lines, 287 U. S. 367, 53 S. Ct. 173, 77 L. Ed. 368.

“A seaman's contract contemplates the application of the general maritime law and that law confers the right to maintenance and cure in case of illness or injury incurred, irrespective of negligence, while he is in the ship's service whether such illness originates on land or upon navigable waters the seaman's admiralty rights to maintenance and cure have a scope as broad as his employment.”

1 *Benedict*, 6th Ed. 61.



No. 10792

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY ASHTON, as Trustee in Bankruptcy of the
Estate of Charles Ralph Sentney,

Appellant,

vs.

CHARLES RALPH SENTNEY,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 25 1944

PAUL P. O'BRIEN,
CLERK

No. 10792

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Adjudication and Order of Reference.....	4
Admission of Service of Designations, etc.....	60
Answer of Bankrupt to Petition for Order to Show Cause re Trust No. 245.....	12
Answer of Bankrupt to Trustee's Petition for Order Revoking Discharge	8
Appeal:	
Admission of Service of Designation, etc.....	60
Designation of Record and Statement of Points.....	54
Notice of	53
Order Extending Time to Docket Appeal.....	61
Supplementary Designation	59
Certificate of Clerk.....	62
Designation of Record and Statement of Points.....	54
Exhibits:	
Trustee's No. 1—Declaration of Trust No. 245.....	112
Trustee's No. 2—Memorandum	239
Findings of Fact, Conclusions of Law and Order.....	35
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	53
Order Affirming the Orders of the Referee (1) Denying Trustee's Motion to Vacate Discharge of Bankrupt; and (2) Denying Trustee's Petition for Turn-over Order and Dismissing Order to Show Cause....	51

Order Extending Time to Docket Appeal.....	61
Order of Referee Dated December 6, 1943.....	14
Petition in Bankruptcy.....	2
Petition of Trustee for Order Revoking Discharge.....	5
Petition of Trustee for Order to Show Cause re Trust No. 245	7
Petition of Trustee for Review.....	46
Referee's Certificate on Review.....	48
Supplementary Designation	59
Testimony on Behalf of Appellant:	
Ashton, Harry	
—direct	92
—cross	93
Mortenson, L. S.	
—direct	80
—cross	83
—redirect	88
Sentney, Charles Ralph	
—direct	67
—cross	77
—redirect	79
Testimony on Behalf of Appellee:	
Goldman, Martin	
—direct	96
—cross	98

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and
RUPERT B. TURNBULL,
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Los Angeles 13, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

DEBTOR'S PETITION

Form No. 1

In the District Court of the United States for the
Southern District of California, Central Division.

In Bankruptcy

No. 41495-H

In the Matter of

CHARLES RALPH SENTNEY,

Bankrupt.

To the Honorable.....Judge of the
District Court of the United States for the Southern
District of California:

The petition of Charles Ralph Sentney, residing at No.
8861 St. Ives Drive *Street*, in the City of Los Angeles,
County of Los Angeles, State of California, by occupa-
tion a Realtor, and employed by C. Ralph Sentney, Inc.
(or engaged in the business of.....),
respectfully represents:

1. Your petitioner has had his principal place of busi-
ness (*or has resided, or has had his domicile*) at 9119 Sun-
set Boulevard, Los Angeles, California, within the above
judicial district, for a longer portion of the six months
immediately preceeding the filing of this petition than in
any other judicial district.

2. Your petitioner owes debts and is willing to sur-
render all his property for the benefit of his creditors, ex-
cept such as is exempt by law, and desires to obtain the
benefit of the Act of Congress relating to bankruptcy.

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

Martin Goldman

Charles Ralph Sentney

Attorney for Petitioner

Petitioner

State of California, County of Los Angeles—ss.

I, Charles Ralph Sentney, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Charles Ralph Sentney Petitioner

Subscribed and sworn to before me this 15 day of October, 1942.

Martin Goldman (Seal)

Notary Public

(Official character.)

My commission expires Sept. 25, 1945.

[Endorsed]: Filed Oct. 16, 1942. [2]

United States District Court
Southern District of California

ORDERS OF ADJUDICATION AND OF GENERAL
REFERENCE

At Los Angeles, in said District, on October 16, 1942.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number 41,495-H

Title of Proceedings Charles Ralph Sentney

Filed 10-16-42

Referee Hubert F. Laugharn, Esq., Los Angeles, Calif.

C. E. BEAUMONT

United States District Judge

[Endorsed]: Filed Oct. 16, 1942. [3]

In the District Court of the United States
Southern District of California

Central Division

In Bankruptcy No. 41,495-H

In the Matter of

CHARLES RALPH SENTNEY,

Bankrupt.

PETITION FOR ORDER REVOKING DISCHARGE.

The petition of Harry Ashton respectfully shows:

1. That he is the duly appointed, qualified and acting Trustee of the estate of the above named bankrupt.

2. That an order of discharge in this matter was made on the 9th day of December, 1942.

3. That petitioner is informed and believes and therefore alleges that said discharge was obtained by said bankrupt by his fraud, in that the bankrupt at the time of the filing of the petition in bankruptcy in this matter was the beneficiary under a certain trust with the First National Bank of Santa Ana, California, created by W. A. Huff and Edith Huff, known as Trust No. 245, of which the bankrupt had knowledge and which was property of value, the title to which passed by operation of law to petitioner; that said bankrupt concealed the existence of said trust from the Trustee and the creditors herein; that petitioner first learned of the existence of said trust on or about the first day of September, 1943, and petitioner has not been guilty of undue laches.

4. That the actual facts in this matter did not warrant the granting of a discharge to the bankrupt, for the reason that as petitioner [4] is informed and believes and therefore alleges, the bankrupt concealed his interest in said trust as above set forth and committed offenses punishable by imprisonment, in that he was guilty of concealment of assets and the making of a false oath by stating in Schedule B-4 filed herein that he had no property in reversion, remainder or expectancy, including property held in trust for him or subject to any power or right to dispose of or to charge.

Wherefore, petitioner prays that the bankrupt be ordered to show cause why an order should not be made revoking his discharge, and upon the hearing of the said order that said discharge be revoked.

Harry Ashton,
Petitioner

EARL E. MOSS AND LOUIS LOMBARDI
Attorneys for Trustee,
By Earl E. Moss

[Verified.]

[Endorsed]: Filed Oct. 7-1943 at Min. past 4 o'clock PM. Hubert F. Laugharn, Referee, M. E. Marsh, Clerk. W.

[Endorsed]: Filed Feb. 4, 1944. [5]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE.

The petition of Harry Ashton respectfully shows:

1. That he is the duly appointed, qualified and acting Trustee of the estate of the above named bankrupt.

2. That petitioner is informed and believes that at the time of the filing of the petition herein, to wit, on the 16th day of October, 1942, the bankrupt was the beneficiary under a certain Declaration of Trust made by W. A. Huff and Edith Huff with the First National Bank of Santa Ana, California, known as Trust No. 245, the title to the bankrupt's interest in which, the bankrupt could have conveyed for delivery upon termination of the trust, and which title passed by operation of law to your petitioner.

Wherefore, petitioner prays that the said bankrupt and the said First National Bank of Santa Ana, California be required to show cause why the petitioner is not the owner of the bankrupt's beneficial interest in said trust; and that upon the hearing of said order it be adjudged that petitioner is the owner of said interest.

Harry Ashton
Petitioner

EARL E. MOSS AND LOUIS LOMBARDI

Attorneys for Trustee,

By Earl E. Moss [6]

[Verified.]

[Endorsed]: Filed Oct. 7 - 1943 at Min. past 4 o'clock PM. Hubert F. Laugharn, Referee, M. E. Marsh, Clerk. W.

[Endorsed]: Filed Feb. 4 - 1944. [7]

[Title of District Court and Cause.]

ANSWER OF BANKRUPT, CHARLES RALPH SENTNEY, TO TRUSTEE'S PETITION FOR AN ORDER REVOKING THE DISCHARGE AND BANKRUPT'S RETURN TO THE ORDER TO SHOW CAUSE ISSUED OCTOBER 7, 1943, THEREON.

Comes now Charles Ralph Sentney, Bankrupt, and for an answer to the Petition of Harry Ashton, Trustee, seeking an order revoking bankrupt's discharge, and as his return to the order to show cause of October 7, 1943, issued by the court on said petition, Bankrupt denies and alleges as follows:

I.

That if it is true that the Trustee is informed that the Bankrupt committed the fraud alleged in Trustee's petition, that the Trustee is misinformed, and Bankrupt denies that at the time of filing his petition of bankruptcy herein and/or during all of the six (6) months immediately thereafter bankrupt was entitled or had an interest in or had any right in any property, thing or chose in action which he could or might have passed title to to the Trustee in Bankruptcy herein, or to which title passed by operation of law to the Trustee in Bankruptcy; this Bankrupt denies that he concealed the existence of any property or the existence of any property under any Trust from the Trustee in Bankruptcy, from the court or from the creditors of his Estate.

II.

That on or about the 10th day of May, 1927, at Santa Ana, Calif- [8]ornia, W. A. Huff and Edith Huff made and entered into a certain Spendthrift Trust wherein the First National Bank of Santa Ana was Trustee, and in which certain other persons were beneficiaries under certain conditions and restrictions set forth in said Trust.

III.

That under the terms of said Trust as it existed at the time of bankruptcy herein, and during all of six (6) months and one (1) day thereafter, Bankrupt had no right, title or interest in or to any property of any kind or character, and under the express terms of said Trust could not make, transfer, sell, pledge, mortgage, alienate, anticipate, or in any other manner convey any interest in the subject matter of said Trust or any rights therein or thereto.

IV.

That at the date of bankruptcy herein, and for six (6) months and one (1) day thereafter, the property of said Trust was vested in the Trustee, the First National Bank of Santa Ana, for Edith Huff and other persons, not including the Bankrupt, and that said Edith Huff and said other persons, at the date of bankruptcy herein and for a period of more than six (6) months and one (1) day after the date of bankruptcy, were living. That no rights of any kind had or could mature in the Bankrupt until after the death of Edith Huff.

V.

Bankrupt admits that he had knowledge of the existence of said Trust No. 245, and alleges that he also had knowledge that he was not entitled to any property under said Trust or any interest in any property therein at the time of bankruptcy, but that he had a mere possibility that he would be a beneficiary under said Trust, determinable only following the death of Edith Huff, who at the date of bankruptcy and all of the six (6) months thereafter was a living person.

VI.

Bankrupt denies each, all and every fact stated in Paragraph IV of Trustee's Petition, denying the same both generally and specifically; denies that the facts did not warrant the granting of a discharge to [9] bankrupt; denies that bankrupt concealed any property; denies that bankrupt committed any offense, either punishable by imprisonment or otherwise; denies that he concealed any assets; denies that he made a false oath.

Alleges that his statement in Schedule B-4, that he had no property subject to any right or power in him to dispose of or to change, was true; denies that he falsely stated anything in Schedule B-4 or in any other section or portion of his schedules in bankruptcy or in his petition for bankruptcy.

As a separate defense, bankrupt alleges:

I.

That immediately prior to the filing of his petition in bankruptcy and the making and filing of his bankrupt

schedule herein, he fully and fairly stated to his attorney, Martin Goldman, a member of the Bar of this court, all of the facts known by him concerning the existence of and the substance of said Trust No. 245; that said Martin Goldman examined a copy of the original Trust and amendments thereto and then and there gave to bankrupt a legal opinion wherein Martin Goldman stated to bankrupt that there was no vested right in the bankrupt and could be no vested right in the bankrupt to any property or any rights under said Trust which bankrupt could, by any means, have transferred or which by any means any creditor of the bankrupt could charge; that said Trust by its expressed terms prohibited any alienation by bankrupt of any interest which he might at any time acquire thereafter, and that there was no property or any property rights existent in the bankrupt which by any means could have passed to the Trustee in Bankruptcy or be conveyed to him. That bankrupt relied upon said legal opinion, then believed and has since continued to believe and now believes that said opinion was and is correct. That bankrupt had no then, or thereafter or present intention to defraud, conceal property or make a false oath.

Wherefore, Bankrupt prays that the Order to Show Cause be dismissed. [10]

RUPERT B. TURNBULL & MARTIN GOLDMAN

By: Martin Goldman

Attorneys for Bankrupt

[Verified.]

[Endorsed]: Filed Oct. 13, 1943, at 40 Min. past 9 o'clock A. M. Hubert F. Laugharn, Referee. M. E. Marsh, Clerk. W.

[Endorsed]: Filed Feb. 4, 1944. [11]

[Title of District Court and Cause.]

ANSWER OF BANKRUPT, CHARLES RALPH SENTNEY, TO PETITION FOR ORDER TO SHOW CAUSE FOR TURN OVER PROCEEDINGS AND BANKRUPT'S RETURN TO ORDER TO SHOW CAUSE GRANTED THEREON ON OCTOBER 7, 1943.

Comes now the Bankrupt, Charles Ralph Sentney, and answering the petition of Harry Ashton, Trustee, for an order to show cause to require the Bankrupt to convey an interest in Trust No. 245, First National Bank of Santa Ana, California, Trustee, as made by W. A. Huff and Edith Huff, and makes and files this, his answer to said petition and his return to the order to show cause issued thereon on October 7, 1943, by the Referee herein.

Bankrupt denies and alleges as follows:

I.

This Bankrupt denies that on the 16th day of October, 1943, he had any interest or any title to any property, real, personal, or mixed, or any chose in action in and to Trust No. 245, First National Bank of Santa Ana, California, Trustee, to-wit, the Trust referred to in Trustee's said petition.

II.

Bankrupt denies that there was any title, right or interest which the Bankrupt had or which was conveyed by operation of law at the date of bankruptcy herein, or any time within six (6) months succeeding the [12] date of bankruptcy.

As a Separate Defense to Said Petition, and as a Separate Return to the Order to Show Cause of October 7, 1943, Herein, Bankrupt Alleges:

I.

That on or about the 10th day of May, 1927, at Santa Ana, California, W. A. Huff and Edith Huff made and

entered into a certain Spendthrift Trust wherein the First National Bank of Santa Ana was Trustee, and in which certain other persons were beneficiaries under certain conditions and restrictions set forth in said Trust.

II.

That under the terms of said Trust as it existed at the time of bankruptcy herein, and during all of six (6) months and one (1) day thereafter, Bankrupt had no right, title or interest in or to any property of any kind or character, and under the express terms of said Trust could not make, transfer, sell, pledge, mortgage, alienate, anticipate, or in any other manner convey any interest in the subject matter of said Trust or any rights therein or thereto.

III.

That at the date of bankruptcy herein, and for six (6) months and one (1) day thereafter, the property of said Trust was vested in the Trustee, the First National Bank of Santa Ana, for Edith Huff and other persons, not including the Bankrupt, and that said Edith Huff and said other persons at the date of bankruptcy herein, and for the period of more than six (6) months and one (1) day after the date of bankruptcy, were living. That no rights of any kind had or could mature in the Bankrupt until after the death of Edith Huff.

Wherefore, Bankrupt prays that the Order to Show Cause be dismissed.

RUPERT B. TURNBULL & MARTIN GOLDMAN

By Martin Goldman

Attorneys for Bankrupt

[Endorsed]: Filed Oct. 13, 1943, at 40 Min. past 9 o'clock A. M. Hubert F. Laugharn, Referee. M. E. Marsh, Clerk. W.

[Endorsed]: Filed Feb. 4 - 1944.

[Verified] [13]

[Title of District Court and Cause.]

ORDER

The debtor's voluntary Petition in Bankruptcy, Schedules and Statement of Affairs were filed herein on October 16, 1942, on which date he was adjudicated a voluntary bankrupt.

On the date of his adjudication there was in existence a certain Trust No. 245 created by W. A. Huff and Edith Huff as Trustors and The First National Bank of Santa Ana, California, as Trustee. The Declaration of Trust set forth the within bankrupt as one of the beneficiaries.

The pertinent provisions of the trust which have a bearing upon the determination of the within problem are the following:

"11.

"Each and every beneficiary under this trust is hereby restrained from, and shall be without right, power and/or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate, or in any other manner affect or impair his or her beneficial and/or legal rights, titles, interests, claims and/or estates in and/or to the income and/or principal of this trust during the entire term thereof, nor shall the rights, titles, interests, and/or estates of any beneficiary hereunder be subject to the rights or claims of the creditors of any beneficiary nor subject nor liable to any process of law or Court upon the claim of any such creditor, and all the income and/or principal under this trust shall be transferable, payable and/or deliverable, only, solely, exclusively, and personally to the herein designated beneficiaries, or their lawful guardian or guardians hereunder at the time they are entitled to take the same

[121] under the terms of this trust, and the personal receipt of the designated beneficiary hereunder, or their lawful guardian, shall be a condition precedent to the payment or delivery of the same by said Trustee.

“12.

“The said Trustors herein named reserve to themselves the exclusive possession and use and enjoyment in, and all rights to, the rents, issues and profits of all the property herein set forth in Exhibit ‘A’, and all other properties that may be hereafter transferred, assigned, set over or conveyed to the Trustee, and each of said properties, for and during the term of the natural lives of both of said Trustors herein named; and it is further understood that this trust, being gratuitously created by said Trustors hereinbefore named, the right and power is hereby reserved unto said Trustors to revoke or amend this trust, in whole or in part, at any time, at their pleasure, during the lives of both of said Trustors, by request in writing addressed and delivered to said Trustee; and the Trustors further reserve the right to revoke any or all of said transfers, assignments or conveyances as to any of the property in Exhibit ‘A’, described, or any other property which may be transferred, assigned or conveyed to said Trustee under this trust,”

and an amendment to the Declaration of Trust executed on August 3, 1935, after mentioning a number of beneficiaries, contains the following:

“‘After payment of the funeral expenses, expenses of last illness and legal debts of the trustor, Edith

Huff, together with the payments of the sums provided in subdivisions 'First' to 'Seventh', both inclusive, the balance of said one-half of the entire trust estate then remaining in the hands of the trustee shall be distributed, disposed of and handled in the following manner:

“ ‘An equal one-third share of said portion of the trust estate then remaining shall be distributed to Bernice Lutz, niece of said trustor, Edith Huff. Should said Bernice Lutz be not surviving at the death of said Edith Huff, but be survived by bodily issue, then [122] said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to said bodily issue per stirpes. Should said Bernice Lutz not be surviving and not be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to Ralph Sentney, brother of said Bernice Lutz, and should said Ralph Sentney be not surviving at said time, then one-fourth of said portion of said estate so to be distributed to Bernice Lutz shall be distributed to William Arthur Lutz, the husband of said Bernice Lutz, and the balance of said portion of said estate shall become a part of the trust estate’ ”, etc.

“ ‘An equal one-third share of said portion of the trust estate then remaining shall be distributed to Ralph Sentney, nephew of said Edith Huff. Should Ralph Sentney be not surviving at the date of death of said Edith Huff but be survived by bodily issue, then that portion of said estate so to be distributed to said Ralph Sentney per stirpes. If, however, said Ralph Sentney be not surviving and not be survived by bodily issue, then said portion of of said estate

shall be distributed to Bernice Lutz, the sister of said Ralph Sentney, and should said Bernice Lutz be not surviving at said time, and should said Ralph Sentney be not survived by bodily issue, then one-half of said portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the wife of said Ralph Sentney, if he is married, and said wife is living with him and no proceedings for divorce or separate maintenance be pending between them at the time of the death of said Ralph Sentney,' " etc.

Charles Ralph Sentney, the within bankrupt, and the "Ralph Sentney" referred to hereinabove are one and the same.

The said trustor, Edith Huff, the aunt of the bankrupt, died on April 20, 1943, which date was more than six months after the date of adjudication herein.

The schedules of the bankrupt contain no reference to the interest of the bankrupt in the said trust, although it appears that [123] at the time of the preparation and filing of his schedules he had full knowledge of the said interest.

The Order of Discharge was made herein on December 9, 1942.

On October 7, 1943 the trustee filed herein a petition for an order revoking the discharge and a petition for an order requiring the bankrupt to show cause why the trustee should not be determined to be the owner of the bankrupt's beneficial interest in the said trust. Orders to Show Cause were issued upon the filing of the said petitions and upon the hearing thereon evidence both oral and documentary was introduced by the respective parties.

Passing for later consideration the effect of the "spend-thrift" and non-assignability provisions of the said Declaration of Trust, we shall consider the nature of the interest and estate of the bankrupt as of the date of his adjudication in bankruptcy.

The bankrupt was named to receive distribution of two separate interests:

(1) One-third share of the remaining portion of the trust which was to go to Bernice Lutz, the bankrupt's sister and the niece of the trustor, and should the said niece not be surviving at the death of the said Edith Huff and not be survived by bodily issue, then the said portion was to be distributed to the bankrupt should he be surviving at the time.

(2) An equal one-third portion of the remaining trust estate to the bankrupt should he be surviving at the date of death of said Edith Huff.

Bernice Lutz, the bankrupt's sister, was surviving at the date of death of the said Edith Huff and therefore we need give no further concern to the said first interest.

The bankrupt was surviving at the date of death of the said Edith Huff. His said interest which we are now considering was subject to

(1) The right of the trustor to revoke, change or eliminate altogether the beneficial interest of the bankrupt. [124] This she did not do. While the exercise of this right could well have reduced, enlarged or entirely eliminated the interest of the bankrupt, the trust was not destroyed by the said reservation.

California Jurisprudence "Trustee", Volume 25, at Sections 149;

"The individual, in conveying or transferring property in trust, may properly reserve a power of revocation; nor is the trust destroyed by such a reservation . . .

The provisions of the trust instrument remain operative until the power is exercised."

In fact, unless the trust is expressly made irrevocable by appropriate terms in the *declaration*, the same is now by statute revocable by the trustor. (Civil Code, Section 2280.)

A grantor may reserve in a deed a right to revoke. Such reservation is not prohibited by law. *Tennant v. John Tennant Memorial Home*, 167 Cal. 570.

A trust containing power of revocation is good until acted upon. *Nichols v. Emery*, 109 Cal. 323.

Likewise, if a trust contains the power of appointment, the particular interests created stand unless the power is used. *In re Wetmore*, 108 F. 520, Third Circuit (Penn.); *Crockanthorp v. Sickles*, 156 App. Div. 753, 141 N. Y. Supp. 370.

Therefore, we may disregard the point (1) above, raised by the bankrupt, that he had no interest for the reason that the same might be changed or eliminated altogether by the act of the trustor.

(2) The interest of the bankrupt would be defeated should he predecease his aunt.

A perplexing problem is presented when we seek to name and define the interest and estate of the bankrupt.

22 Cal. Jur., "Remainders and Reversions":

"Sec. 1. 'Remainder' — 'Executory Interest' — 'Conditional Limitation.'—In respect of the time of their enjoyment, estates or interests in property are

either present or future. A future estate which is limited to commence upon the ex- [125] piration of a preceding or primary estate is designated as an estate or interest in remainder; . . .”

“Sec. 3. ‘Vested’ and ‘Contingent’ Estates and interests.—Referring to the nature of future estates, it has been said with much truth that ‘there is no subject of the law more abstruse or in which greater refinement of learning has been displayed.’ The Civil Code classifies such estates and interests as being either ‘vested’ or ‘contingent’, and supplies general definitions as to the meaning of these terms; but it is to be noted that the words in question are in common use in several branches of the law, and that their meaning is varied by the particular legal right or situation to which they are applied. The words have no meaning which is common to all situations; and much confusion of thought and misunderstanding has resulted from an assumption that they have a definition which is of universal application. In respect of the creation and attributes of future estates, the terms ‘vested’ and ‘contingent’ are employed in the law of perpetuities to denote alienability and inalienability, and in the law of deeds and wills to describe interests which are descendible, devisable and alienable, and those which have not this quality. In these connections the words in question have reference to ownership as being dependent upon the survival of the person who is named as the taker of the future estate or interest. If ownership is dependent upon survival, the estate is contingent; if ownership is not dependent upon survival, the estate is vested.”

“Sec. 10. Provision for Defeasance—Revocation by Grantor. In creating a future estate or interest

the owner of the property may provide for its defeasance; nor is the estate invalidated merely because it is defeasible. Accordingly, it is held that a deed of an estate in remainder is not to be held valid by reason of the fact that it contains a clause reserving to the grantor a power to revoke the grant. But the individual, by the creation of future estates which are limited to take effect at the termination of a [126] beneficial life estate in himself, may preclude himself to revoke the trust and destroy the future estates. Nor is it material whether the future estates are 'vested' or 'contingent' in any of the senses in which these terms are used."

"Sec. 11. The law recognizes a right in the individual to create future estates or interest which are conditional or contingent, . . ."

"Sec. 13. . . Furthermore although the estate is contingent upon the survival of the person who is named as taker, it is considered to be alienable and subject to the claims of creditors. The assignee or creditor becomes substituted for the designated person, and his right to the property is dependent upon such person's survival at the time when the estate is limited to take effect in possession or enjoyment . . ."

"Sec. 14. Breach of Condition or Happening of Contingency. Being limited to take effect upon the happening of a contingent event, or upon nonperformance of a lawful condition by the taker of the primary estate, the future estate or interest becomes vested in ownership upon the occurrence of the event . . ."

"Sec. 21. . . . It has long been settled, however, that an estate is descendible, devisable and alienable, although possession of the property may be postponed until a future time,—and although it is subject to being cut off or defeated by the occurrence of a contingent event or situation. The statute provides that 'future interests pass by succession, will and transfer, in the same manner as present interest.' . . . But the law does not recognize as an estate or interest 'a mere possibility' that a person may acquire property,—such as the expectancy of an heir apparent,—and the 'possibility' or expectation of ownership is deemed not to be a subject of transfer or alienation."

The nature and extent of the interest is to be determined by California statutes. *Eaton v. Boston Safe Deposit & Trust Company*, 240 U.S. 427; 36 A. B. R. 701. *Nichols v. Eaton*, 91 U.S. [127] 716.

The interest here is obviously more than a plain expectancy or a possibility and it cannot be considered in the same status as the hope of an heir to inherit by will or succession where there has been no death at the time of bankruptcy. In the *Matter of First National Bank & Trust Company of Elmira*, 34 A. B. R. (N.S.) 806.

The argument of counsel for the bankrupt that the interest is a mere expectancy such as the right of a beneficiary under an insurance policy where the insured is still living, is not applicable here.

" . . . a possibility, a hope of an heir of a person still living, or of a beneficiary under an insurance policy which is subject to change of beneficiary, does not pass to the trustee in bankruptcy. Such inter-

ests are not property." *Matter of First Nat. Bank & Trust Co.*, 34 A.B.R. (N.S.) 806, at 810.

The interest, even though contingent, and in that sense not "vested", being an interest to be received in possession upon the death of the testator, would pass to the trustee. *Noonan v. State Bank of Livermore*, 20 A. B. R. (N.S.) 642.

The interest in question is a future estate. Civil Code Sec. 767:

"A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time."

Likewise, it is a remainder interest. Civil Code Sec. 769:

"When a future estate . . . is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name."

and a remainder estate may be limited upon the happening of an event as here upon the demise of the said Edith Huff within the lifetime of the bankrupt. [128]

Assuming that the Declaration of Trust did not contain the "spendthrift" and "nonassignment" provisions, the trustee would then take the said interest of the bankrupt; and this is so even though the trustor might revoke the interest or the bankrupt might predecease the trustor.

In the *Matter of St. John*, 105 F. 234 (District Court of New York), property was given to trustees, the income to the daughter for life, the principal on her death to be divided between her children; if none surviving her, between testator's two sons. The daughter was still alive upon the bankruptcy of one of the sons. The bank-

rupt contended that the interest was a contingent remainder dependent upon two contingencies: (1) if the daughter left survivors, and (2) upon the bankrupt's surviving the sister. The court held that the interest of the bankrupt passed to his trustee, the case determining that the interest of the bankrupt is an expectant estate. The bankrupt's estate is a future estate limited to commence in possession at a future time, on the death of the daughter and on the contingency that she die without child surviving. Section 28 (New York): "Where a future estate is dependent on a precedent estate, it may be termed a remainder"; and Section 30 holds a remainder vested "where there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." The Court stated: "The fact that the possession of the estate depends upon a future contingency which may never happen, although it lessens materially the value of the estate, does not destroy its character as a vested interest which passed to the trustee."

Likewise, under the Michigan law the expectant interest of the bankrupt in corpus funds, although contingent upon bankrupt's survival of life beneficiary vests in the trustee. *Horton v. Moore*, 42 A. B. R. (N.S.) 485.

Such interest likewise passes in Maryland. *Matter of [129] Moore*, 10 A. B. R. (N. S.) 568.

A remainder interest even though the same may be lost passes to the trustee. *Dudley, Jr. v. Tucker*, 6 A. B. R. (N. S.) 95.

Even though the possession or enjoyment may be contingent upon the survival of the taker, the estate is nevertheless vested. *Estate of Ritzman*, 186 Cal. 567.

And it is considered alienable and subject to the claims of creditors. *Newlove v. Mercantile Trust Co.*, 156 Cal. 657.

Although the person named as the taker of the future estate does not have the right to claim the property until the contingent event or situation shall have happened or arisen. *Estate of Glann*, 177 Cal. 347.

And unless by the provisions of the trust instrument the beneficiary is restrained, he has a right to assign his interest. *Title Ins. & Trust Co. v. Duffill*, 191 Cal. 629.

Noonan v. State Bank of Livermore, 20 A. B. R. (N. S.) 642 (State of Iowa): "If it is held that the interest . . . was a contingent remainder, then under federal statute, the question arises: Could the plaintiff 'by any means have transferred' his interest in this property? We have settled this question in the case of *McDonald v. Bayard Savings Bank*, 123 Iowa 413, 98 N. W. 1025, where we held, in fact, that the contingent interest of a remainderman is such a present and existing one as to be susceptible of conveyance by deed . . . This seems to be the general rule as to rights under contingent remainders."

Sinclair v. Crabtree, 211 Cal. 524: Under 693 Civil Code, future interest is property either vested or contingent, and under 699 Civil Code: "Future interests pass by succession, will, and transfer, in the same manner as present interests."

The following are additional cases in which the courts have determined that the interests passed to the trustee in bankruptcy:

In re Wood, 3 A. B. R. 572; 98 F. 972.

In re Peter J. Shenberger, 4 A.B.R. 487; 102 F. 978.

In re Nelson A. St. John, 5 A.B.R. 190; 105 F. 234. [130]

In re Twaddell, 6 A.B.R. 539; 110 F. 145.

In re McHarry, 7 A.B.R. 83; 111 F. 498.

Woods v. Little, 13 A.B.R. 742; 134 F. 229.

Matter of First Nat. Bank & Trust Co., 34 A.B.R. (N.S.) 806:

"On or about September 29, 1920, Ella M. Brand (hereinafter called the settlor) executed a deed of trust to the Merchants National Bank of Elmira, N. Y. It by merger became the First National Bank and Trust Company of Elmira. By the deed the settlor transferred to the trustee certain personal property and unimproved real property in trust to pay the income to her for life and upon her death, to distribute the principal to named beneficiaries, including her daughter, Mrs. Keeton."

"About January 19, 1933, said Henrietta S. Keeton was, on her voluntary petition, adjudged a bankrupt. James J. O'Connor was duly appointed trustee in bankruptcy. He demanded the share of Henrietta S. Keeton from the trustee herein. Both Mrs. Keeton and Mr. O'Connor, her trustee in bankruptcy, are parties to this proceeding. Her interest in the trust estate was, in good faith, omitted from the schedules in bankruptcy. Upon her examination she disclosed it. She has not in any way assigned or parted therewith.

"The question for determination is whether Mrs. Keeton's distributive share in remainder passed to her trustee in bankruptcy."

"When Mrs. Keeton was adjudicated bankrupt, the settlor of this trust was living and the trust was

in force. Was her beneficial interest in remainder then 'property' which she 'could by any means have transferred?' This question must be determined under the law of the state of New York."

"Section 15 of the Personal Property Law reads:

" 'The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. But the right and interest of the beneficiary of any other trust in personal property may be transferred.'

"Section 59 of the Real Property Law reads: [131]

" 'An expectant estate is descendible and alienable, in the same manner as an estate in possession.'

"We think Mrs. Keeton's interest was 'property' and though not vested in possession was vested. Whether vested or contingent, it was transferable and alienable."

"We are cited to *Matter of Hoadley* (D. C., N.Y.), 3 Am. B. R. 780, 101 F. 233. Of this case 3 Remington on Bankruptcy, Sec. 32, says: 'In this case the distinction was drawn between contingency of person and contingency of event.' In the present case the only contingency is as to the event. Even a contingency as to the person does not seem to make a trust interest non-transferable under the later cases above cited."

" . . . a possibility, a hope of an heir of a person still living, or of a beneficiary under an insurance policy which is subject to change of beneficiary, does not pass to the trustee in bankruptcy. Such interests are not property. As well said in *National*

Park v. Billings, *supra*, 144 App. Div. 536, 540: 'That which the heir has from the *curtesy* of his ancestor, and which is nothing more than the mere hope of succession' is not the subject of disposition. 'Mere expectancies and bare possibilities of acquiring property do not pass. They do not constitute property nor title to property.' (3 Remington Bankruptcy, Sec. 1199.) In Matter of Baker (C.C.A., 6th Circ.), 8 Am. B.R. (N.S.) 448, 13 F. (2d) 707, Baker purchased of two brothers their respective expectancies in their mother's estate. He became bankrupt during his mother's lifetime. The court held that neither Baker's individual interest nor the interest acquired from his brothers passed to the trustee in bankruptcy."

Where property was left to six sons, no portion to be sold for ten years, the son's share to be forfeited if he contracted bad habits and likewise to be forfeited should the son die before division of property, each son acquired a vested interest subject to divestiture upon the happening of the subsequent act and [132] the court determined there was a vested interest which could be transferred by the devisee. *Newlove v. Mercantile Trust Company of San Francisco*, 156 Cal. 657.

Attention is now directed to the "spendthrift" and "non-assignable" provisions of the trust as hereinabove set forth.

California recognizes "spendthrift" trusts. *Kelly v. Kelly*, 11 C. (2d) 356: "It is of the essence of a spendthrift trust that it is not subject to voluntary alienation by the cestui, nor subject to involuntary alienation through attachment or other process at the suit of his creditors. (*McColgan v. Walter Mc-*

Gee, Inc., 172 Cal. 182 (155 Pac. 995, Ann. Cas. 1917D. 1050); Seymour v. McAvoy, 121 Cal. 438 (53 Pac. 946, 41 L.R.A. 544); San Diego Trust etc. Bank v. Heustis, 121 Cal. App. 675 (10 Pac. (2d) 158); Canfield v. Security First Nat. Bank, 8 Cal. App. (2d) 277 (48 Pac. (2d) 133); 1 Bogert, Trusts and Trustees, p. 75; 43 Harvard Law Review, 84; 21 Cal. Law Rev. 142; 22 Cal. Law Rev. 482.)”

Inasmuch as a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had right to look for payment, they cannot complain that the donor has provided that the income be paid personally to the beneficiary or be not subject to the claims of creditors. 4 Cal. Law Review, 426. *McColgan v. Magee, Inc.*, 172 Cal. 182.

Civil Code 859 may be considered an exception to this doctrine, and where the trust is created to receive the rents and profits of real or personal property, the sum, beyond a fund necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of creditors of such persons. *Canfield v. Security First National Bank*, 8 C.A. (2) 277, and 13 Cal. 2d, page 1.

Likewise, restraint may be made upon assignment of interest. *Title Ins. & Trust Co. v. Duffill*, 191 Cal. 629; *Curtin v. Kowalsky*, 145 Cal. 431. [133]

Unless restrained by the provisions of the trust instrument, the beneficiary has a perfect right to assign his interest. “Trusts”, 25 Cal. Jur. 173.

Where a trust is created for the benefit of another the beneficiary may be restrained by appropriate provisions of the trust instrument from disposing of his trust interest or ownership. 25 Cal. Jur. 174.

It is insisted by counsel for the trustee that even though the instrument is by its terms nonassignable and is accompanied by provisions deemed appropriate to create a "spendthrift trust", that since in certain instances the bankrupt could make a transfer of the property for a consideration which would be enforced in equity, therefore the "property" was such as the bankrupt (Section 70a (5)) "could by any means have transferred".

This test has been disapproved by the Supreme Court of the United States and it determined that Section 70a (5) which vests the trustee with all the property that the bankrupt "could by any means have transferred" has no application to spendthrift trusts valid and effective against creditors, notwithstanding the beneficiary, under state law as construed by the highest court of the state, may anticipate and assign for his own benefit, to the exclusion of creditors, said power having been determined in effect in a legal exemption in favor of the beneficiary attaching to and inherent in the property. *Eaton v. Boston Safe Deposit & Trust Company*, 36 A. B. R. 701; 240 U.S. 427.

Edith Huff, the Trustor, died more than six months after the filing of the bankruptcy petition herein, therefore the new Section 70a (7) and (8) can have no application here.

70a. The trustee . . . shall be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy. . . to all . . . (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior [134] to bankruptcy and which, within six months thereafter, become assignable in-

terests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) . . . All property which vests in the bankrupt within six months after bankruptcy by bequest, devise, or inheritance shall vest in the trustee. . .”

It will be recalled that Section 70a(5) gives the trustee title to property which the bankrupt “could by any means have transferred or which might have been levied upon and sold”, etc.

In some states by application of the state law certain of the interests did not meet the qualifications of subdivision (5) and were determined by the courts not to constitute assets. The said subdivisions (7) and (8) were added which brought the interests into the estate as assets if the condition arose or the death occurred within six months of the filing of the petition.

The trustee points out that the bankrupt should have scheduled the interest. The trustee is, of course, right in connection with this point.

Section 7(8) of the Bankruptcy Act provides that the bankrupt “shall . . . prepare, make oath to, and file in court . . . a schedule of his property.”

Section 30 of the Bankruptcy Act provides that “all necessary rules, forms, and orders as to procedure and for carrying the provisions of this title into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.” Under this Section the Supreme Court has prescribed the form of the schedules, and the schedules established by the Supreme Court set forth on Schedule B-4; “Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.”

Eight of the Supreme Court Judges who were sitting at the time the General Orders and Forms were promulgated were on the bench and had previously decided the case of *Pearsall v. Great Northern Railway Co.*, 161 U.S. 646. This decision went to great length in defining vested rights, expectancies, contingent interests, etc., so it can be [135] said that we have rather definite information as to what the Supreme Court intended by Schedule B-4.

I can personally say that after attempting to review many reported cases on the vesting or nonvesting in the trustee of expectancies, vested and contingent remainders, reversions, conditional limitations, rights of entry for conditions broken, executory devises, etc., that it would be an imprudent and hazardous procedure to allow the bankrupt in each instance to make his own determination as to whether or not the particular interest vested. He is required to list in detail his property which he claims is exempt so that the Court may pass upon the exemption. Likewise he is required to list and schedule those interests, whether they vest in the trustee or not, which are enumerated in Schedule B-4. The scheduling of the same allows the creditors, the trustee and the Court to investigate the particular kind and character of interest and reach a determination as to whether or not the same passes into the Bankruptcy Court. Most certainly the determination should not be left with the bankrupt.

In many cases such as in the instant case there is no record available pertaining to the interest unless the same is supplied by the bankrupt.

Apparently information of the alleged interest came to the creditors after the discharge was granted.

At the first examination of the bankrupt the bankrupt did not reveal the existence of the interest. On the other

hand, it must be admitted that he was not asked the direct question as to whether or not he had any such interest.

Counsel for the trustee maintains that the discharge of the bankrupt should be revoked because of the said concealment. He has cited a number of cases, with which I do not disagree, showing the general power of the Court to revoke discharges in instances other than upon grounds set forth in Section 15.

In this case, however, as soon as the bankrupt and his counsel were confronted by the trustee with the information which he [136] had secured in connection with the interest in said trust, they readily admitted the said interest. Counsel for the bankrupt states that at and prior to the bankruptcy proceedings the bankrupt had presented to him the question of whether or not the said interest was an asset; that he had spent many hours investigating the law on the subject, and that he had rendered an opinion to the bankrupt that the same did not pass to the trustee and was not an asset of the estate and need not be scheduled. At the hearing there was introduced in evidence a brief which had been prepared by the attorney for the bankrupt at the time he originally gave the said advice to the bankrupt when he was preparing the schedules of the bankrupt. I must frankly admit that I agree with his conclusion that the interest is not an asset herein, but I do not agree with his conclusion that the same need not be scheduled. On the other hand, I cannot find that there was any bad faith or concealment. Neither can I find that the bankrupt knowingly or intentionally made a false oath.

Matter of Soroko, 53 A. B. R. (N. S.) 223;

"Accordingly, it may be assumed that the advice given to the bankrupt by his attorney was erroneous

and that the bankrupt has not established that his statements under oath on the two occasions were true. The statute, however, bars a discharge only if a false oath was made 'knowingly and fraudulently', that is, if the false statement constituted an 'intentional untruth'. In *re Slocum* (C.C.A., 2nd. Cir.), 11 Am. B.R. (N.S.) 16, 22 F. (2d) 282, 285."

In *re Wyche*, 51 Fed. Supp. 825:

"To justify a denial of bankrupt's discharge, failure to list assets must have been made or done with a willful and fraudulent intent. Bankr. Act. Sec. 14, sub. c(1), 11 U. S. C. A. Sec. 32, Sub. c(1)."

"... the jurisprudence is well established that the act of the bankrupt complained of must have been made or done with a wilful and fraudulent intent to justify denial of bank- [137] rupt's discharge. Collier, 14th Ed., Vol. 1, p. 1360, provides: 'In order to justify a refusal of discharge under Sec. 14c (4), it must be shown that the acts complained of were done with an intent to hinder, delay, or defraud his creditors. This intent, moreover, must be an actual fraudulent intent as distinguished from constructive intent.'"

Therefore, both petitions of the trustee are denied.

[Dated]: December 6, 1943.

Hubert F. Laugharn
Hubert F. Laugharn
Referee in Bankruptcy

[Endorsed]: Filed Dec. 6-1943 at 30 Min, past 3 o'clock P. M. Hubert F. Laugharn, Referee. M. E. Marsh, Clerk. W.

[Endorsed]: Filed Feb. 4, 1944. [138]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER.

The trustee herein, having filed his petition seeking an order vacating and setting aside the discharge of the bankrupt, and also having filed his petition seeking an order requiring the bankrupt to turn over to the trustee, as an asset of the estate, the interest of the bankrupt and the inheritance of the bankrupt under a trust known as Trust No. 245, The First National Bank of Santa Ana, California, Trustee, and the bankrupt having filed his answers to said petitions and the returns to the orders to show cause issued thereon, and the matters having come on regularly for hearing before the Referee in Bankruptcy, the trustee being personally present and represented at said hearing by his Counsel, Earl E. Moss, Esq. and Louis Lombardi, the bankrupt being represented by his counsel, Rupert B. Turnbull and Martin Goldman, and the First National Bank of Santa Ana, California, being represented by A. M. Bradley, Esq. its attorney, and evidence, oral and documentary, having been introduced by the parties, and it having been stipulated by counsel for the respective parties that all the evidence offered might be considered as evidence on each of the petitions and orders to show cause, and the matters having been submitted to the Referee on briefs, and the respective parties having filed their briefs, and the same having been considered by the Court, the Court now makes its Findings of Fact with respect to the trustee's seeking order revoking the discharge of the bankrupt. The Court finds, with respect to [139] the petition of the trustee seeking an order revoking the discharge of the bankrupt, as follows:

I.

That on the 16th day of October, 1942, the above-named bankrupt filed in the above-entitled court a voluntary petition in bankruptcy, duly signed by him and verified before a notary public, and on said date an order of adjudication was duly entered.

II.

That on the 4th day of November, 1942, Harry Ashton was duly appointed Trustee in Bankruptcy of the estate of said bankrupt and thereafter qualified as such trustee and ever since has been and now is the duly appointed, qualified and acting trustee of the estate of said bankrupt.

III.

That on the said 16th day of October, 1942, there was in existence a certain trust known as Trust No. 245, created by W. A. Huff and Edith Huff as trustors, and the First National Bank of Santa Ana, as trustee, and on said date the bankrupt was one of the beneficiaries therein. That said trust contained, among others, the following provisions:

"Each and every beneficiary under this trust is hereby restrained from, and shall be without right, power and/or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate, or in any other manner affect or impair his or her beneficial and/or legal rights, titles, interests, claims and/or estates, in and/or to the income and/or principal of this trust during the entire term thereof, nor shall the rights, titles, interests, and/or estates of any beneficiary hereunder be subject to the rights or claims of the creditors of any beneficiary nor subject nor libale [140] to any process of law or

Court upon the claim of any such creditor, and all the income and/or principal under this trust shall be transferable, payable and/or deliverable, only, solely, *exclusively*, and personally to the herein designated beneficiaries, or their lawful guardian or guardians hereunder at the time they are entitled to take the same under the terms of this trust, and the personal receipt of the designated beneficiary hereunder, or their lawful guardian, shall be a condition precedent to the payment or delivery of the same by said Trustee.

“12.

“The said Trustors herein named reserve to themselves the exclusive possession and use and enjoyment in, and all rights to, the rents, issues and profits of all the property herein set forth in Exhibit “a”, and all other properties that may be hereafter transferred, assigned, set over or *conveyed* to the Trustee, and each of said properties, for and during the term of the natural lives of both of said Trustors herein named; and it is further understood that this trust, being gratuitously created by said Trustors hereinbefore named, the right and power is hereby reserved unto said Trustors to revoke or amend this trust, in whole or in part, at any time, at their pleasure, during the lives of both of said Trustors, by request in writing addressed and delivered to said Trustee; and the Trustors further reserve the right to revoke any or all of said transfers, assignments or conveyances as to any of the property in Exhibit “A” described, [141] or any other property which may be transferred, assigned or conveyed to said Trustee under this trust, . . .”

and an amendment to the Declaration of Trust executed on August 3, 1935, after mentioning a number of beneficiaries, contains the following:

“ ‘After payment of the funeral expenses, expenses of last illness and legal debts of the trustor, Edith Huff, together with the payments of the sums provided in subdivisions “First” to “Seventh”, both inclusive, the balance of said one-half of the entire trust estate then remaining in the hands of the trustee shall be distributed, disposed of and handled in the following manner:

“ ‘An equal one-third share of said portion of the trust estate then remaining shall be distributed to Bernice Lutz, niece of said trustor, Edith Huff. Should said Bernice Lutz be not surviving at the death of said Edith Huff, but be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to said bodily issue per stirpes. Should said Bernice Lutz not be surviving and not be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to Ralph Sentney, brother of said Bernice Lutz, and should said Ralph Sentney be not surviving at said time, then one-fourth of said portion of said estate so to be distributed to Bernice Lutz shall be distributed to William Arthur Lutz, the husband of said Bernice Lutz, and the balance of said portion of said estate [142] shall become a part of the trust estate’ ”, etc.

“ ‘An equal one-third share of said portion of the trust estate then remaining shall be distributed to Ralph Sentney, nephew of said Edith Huff. Should Ralph Sentney be not surviving at the date of death

of said Edith Huff, but be survived by bodily issue, then that portion of said estate so to be distributed to said Rslph Sentney shall be distributed to the bodily issue of said Ralph Sentney per stirpes. If, however, said Ralph Sentney be not surviving and not be survived by bodily issue, then said portion of said estate shall be distributed to Bernice Lutz, the sister of said Ralph Sentney, and should said Bernice Lutz be not surviving at said time, and should said Ralph Sentney be not survived by bodily issue, then one-half of said portion of said estate so to be distributed to said Rslph Sentney shall be distributed to the wife of said Ralph Sentney, if he is married, and said wife is living with him and no proceedings for divorce or separate maintenance be pending between them at the time of the death of said Rslph Sentney,' ” etc.

IV.

That Charles Ralph Sentney, the bankrupt herein, and Ralph Sentney mentioned in said trust are one and the same person.

V.

That the surviving trustor in said trust, said Edith Huff, the aunt of the bankrupt, died on April 20, 1943, more than six months after the date of adjudication herein.

VI.

That Schedule B-4 of the schedules in bankruptcy, signed [143] and verified by the bankrupt and attached to his petition in bankruptcy herein is as follows:

Schedule B-4

Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.

(N. B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as know to the debtor.)

General Interest	Particular Description	Estimated value of Interest	
		Dollars	Cents
Interest in Land	None		

Personal Property	None		

Property in Money, Stock, Shares, Bonds,	Annuities, etc.		
	None		

Rights and Powers, Legacies and Bequests	None		
	Total		None

VII.

That no mention was made by said bankrupt at any place in said schedules, or his statement of affairs filed concurrently therewith, of the existence of said trust. That the bankrupt, for many [144] years prior to said 16th day of October, 1942, knew of the existence of said trust and the provisions thereof. That shortly prior to the filing of the petition herein, the bankrupt procured a copy of the Declaration of Trust with the amendments thereto, and submitted the same to Martin Goldman, his attorney in this proceeding, and said Martin Goldman prepared a brief to determine whether or not the law required the bankrupt to describe said interest in said trust in the schedules in bankruptcy, which said brief consists of the first three pages of "Trustee's Exhibit 2" in this proceeding. That both before and after the preparation of said brief, the said bankrupt and his said attorney, Martin Goldman, discussed in detail the question of the necessity of describing said interest in said trust in the schedules in bankruptcy. That after making said search of the law and preparing a brief thereon, said Martin Goldman advised the bankrupt that there was no property right in said trust which should, or ought to be, described in said schedules.

VIII.

That at the first meeting of the creditors of said bankrupt, held on the 4th day of November, 1942, the said bankrupt testified as a witness and did not reveal the existence of said trust and his interest therein.

IX.

That an order was made by the above-entitled court on the 9th day of December, 1942, granting said bankrupt

a discharge; that neither the trustee of said bankrupt's estate nor the creditors thereof, nor the court knew of the existence of said trust prior to about the first day of September, 1943. That on October 7, 1943, the trustee of said bankrupt's estate filed a petition for an order revoking the bankrupt's discharge.

From the foregoing findings of fact, the court makes the following conclusions of law:

I.

That at the date of the filing of the petition in bank- [145] ruptcy, and for a period of six months continuously thereafter, and for a period of six months after the adjudication of bankruptcy herein, and during all of said times, the bankrupt had no property interest in Trust No. 245, the First National Bank of Santa Ana, Trustee, which the bankrupt could by any means have transferred, and that there was no property in said Trust which could or did pass by operation of law to Trustee in bankruptcy.

II.

That the interest of the bankrupt in the said trust, as above set forth on the date of the filing of the petition in bankruptcy, should have been described by the bankrupt in Schedule B-4 of his schedules in bankruptcy, regardless of the fact that the interest did not pass to the Trustee.

III.

That the bankrupt was not guilty of any bad faith or concealment of assets or knowingly or intentionally making a false oath.

IV.

That the petition of the trustee for an order revoking the discharge of the bankrupt should be denied and said petition dismissed.

Findings of fact with respect to the petition of the trustee for an order to show cause requiring an order declaring that the estate of the bankrupt and the trustee are the owners of a beneficial interest in Trust No. 245, First National Bank of Santa Ana, California:

I.

The Court finds it is not true that at the time of the filing of bankrupt's petition herein, on the date of the adjudication in bankruptcy of the bankrupt herein or at any time during the six months' period immediately succeeding the adjudication of the bankrupt herein, or at any of said times the bankrupt had any property interest as the beneficiary or otherwise in Trust No. 245, the First National Bank of Santa Ana, California, Trustee, which he, the bankrupt, could have by any means transferred, or which pass by operation of law to [146] Trustee in bankruptcy.

II.

The Court finds that there was a Trust created by W. A. Huff and Edith Huff during their lifetime with the First National Bank of Santa Ana, as Trustee, known as Trust No. 245; that said Trust was a Spendthrift Trust with the absolute right in the donors or one of the donors on the death of the other to change and vary the terms thereof.

III.

The Court finds that the trustee in bankruptcy, on the date of the commencement of this proceeding, and for six months thereafter, did not acquire any right, title or interest as an asset in the within bankrupt estate in said trust, and the court further finds that, under the provisions of Section 70 (A) 5 of the Bankruptcy Act, the said interest of the bankrupt in said trust was not such property right as would be vested in the trustee.

From the foregoing findings of fact, the court makes the following conclusions of law:

I.

That the petition of the trustee for an order determining that the First National Bank of Santa Ana, California, and the bankrupt herein should be required to convey to the trustee in bankruptcy the bankrupt's alleged beneficial interest in said Trust No. 245 should be denied.

II.

The Court concludes that Harry Ashton, Trustee in bankruptcy herein is not the owner of the bankrupt's beneficial interest in Trust No. 245, or any proceeds which he may ultimately recover therefrom, either as an heir-at-law of Edith Huff or an ultimate beneficiary under the terms of the Trust No. 245, as created by W. A. Huff and Edith Huff, donors, with the First National Bank of Santa Ana, California, Trustee, known as Trust No. 245.

It Is Therefore Ordered as Follows:

That the petition of the Trustee for an order vacating [147] and setting aside the discharge of the bankrupt be and hereby is denied.

That the petition of Trustee, Harry Ashton, herein for an order determining that the bankrupt and the First National Bank of Santa Ana, California, have no interest in Trust No. 245, and that the same be conveyed to the Trustee, Harry Ashton, be, and hereby is denied, and the order to show cause issued on said petition is dismissed.

That the petition of the Trustee, Harry Ashton, seeking the determination, that he as Trustee in bankruptcy herein is entitled to the beneficial interest and any and all beneficial interests in bankruptcy in Trust No. 245, be and hereby is denied, and

It is determined, concluded and found that the estate of the bankrupt and the Trustee thereof, have no right, title or interest in said Trust No. 245 or any of the property thereof.

Dated this 24th day of January, 1944.

Hubert F. Laugharn

Referee in Bankruptcy

[Endorsed]: Filed Jan. 24, 1944, at Min. past o'clock M. Hubert F. Laugharn, Referee, M. E. Marsh, Clerk. W.

[Endorsed]: Filed Feb. 4 - 1944. [148]

[Title of District Court and Cause.]

PETITION FOR REVIEW.

Comes now Harry Ashton and petitions for a review of that certain order made in the above-entitled matter on the 24th day of January, 1944, a copy of which said order is hereto attached marked Exhibit "A," and made a part hereof on the following grounds, which are the *errs* in respect to said order:

(1) That the findings of fact contained in said order are not sustained by the evidence.

(2) That said order is contrary to law.

(3) That the court erred in failing to find that the said bankrupt wilfully and knowingly failed to include in his schedules in bankruptcy, a description of the property contained in the Huff trust.

(4) That the court erred in failing to find that the bankrupt was guilty of acts for which his discharge could have been denied at the time of the granting of the order of discharge.

(5) That the court erred in failing to revoke and set aside the bankrupt's discharge.

(6) That the court erred in failing to find that, on the date of the commencement of these proceedings, the bankrupt had an interest in said Trust No. 245 with the First National Bank of Santa Ana, California, which the bankrupt could have transferred. [149]

(7) The court erred in failing to find that the bankrupt, at the time of the commencement of these proceedings, could have transferred said interest in said trust, said transfer to become effective as of the date the trust became vested in the bankrupt.

(8) The court erred in failing to find that, by reason of the fact that the bankrupt could have transferred his

interest in said trust, effective as of the date of the vesting of said interest in the bankrupt and that, therefore, the bankrupt's said interest in said trust passed by operation of law to your petitioner as such trustee in bankruptcy.

(9) The court erred in finding that the omission by the bankrupt from his schedules in bankruptcy of a description of his interest in said trust was in good faith and was not knowingly and wrongfully done.

(10) The court erred in finding that the bankrupt in good faith relied upon the advice of his attorney in failing to describe his interest in said trust in his schedules in bankruptcy.

(11) The court erred in finding that the advice of the bankrupt's attorney, that the law did not require that the interest in said trust be described by the bankrupt in his said schedules, was given in good faith.

Wherefore, petitioner prays that a review be had of said order and that the same be reversed and that findings be made that, the bankrupt's interest in said trust passed by operation of law to your petitioner as such trustee in bankruptcy, and that the bankrupt's discharge be revoked and set aside, and for all further and proper relief.

Harry Ashton

Trustee in Bankruptcy, Petitioner

EARL E. MOSS & LOUIS LOMBARDI

By Earl E. Moss [150]

[Verified.]

[Endorsed]: Filed Jan. 28, 1944 at Min. past 10 o'clock A. M. Hubert F. Laugharn, Referee. M. E. Marsh, Clerk.

[Endorsed]: Filed Feb. 4 - 1944. [151]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW.

To the Hon. Harry A. Hollzer, Judge of the United States District Court, for the Southern District of California:

I, Hubert F. Laugharn, Referee in Bankruptcy, to whom the above entitled matter has been referred, do hereby certify as follows:

That in the within proceeding the bankrupt filed a voluntary petition in bankruptcy and was adjudicated on October 16, 1942. Thereafter, in the administration, Harry Ashton was appointed trustee for the said estate. On December 9, 1942 an order was made granting said bankrupt a discharge.

Thereafter and on October 7, 1943, the said trustee filed petitions for order to show cause and orders to show cause were issued thereon requiring the bankrupt:

(1) To show cause why his order of discharge should not be revoked.

(2) To show cause why Harry Ashton, as trustee for the within estate, should not be entitled, as an asset of the within estate, to a certain interest in a trust designated as No. 245.

On January 24, 1944 I made Findings of Fact. Conclusions of Law and Order denying both of the petitions of the trustee. Thereafter, and on January 28, 1944, the said trustee filed herein his Petition for Review of the order denying both petitions.

At the conclusion of the hearing I prepared an "Order" in the form of an opinion, setting forth my views of the matter in controversy [152] and requested that findings and order be prepared by counsel for the bankrupt in accordance therewith. Thereafter, findings and order were prepared by respective counsel and Findings and Order were signed and filed as aforesaid on January 28, 1944.

I determined that the interest of the bankrupt was not an asset of the bankrupt estate at the date of the adjudication herein and did not become an asset under the provisions of Section 70a (7 and 8) within six months of the date of adjudication. I further determined that the interest of the bankrupt, such as it was, and regardless of the above considerations, should have been set forth and scheduled by the bankrupt in Schedule B-4, "Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge." However, I made the further determination that the bankrupt had submitted all of the facts to his attorney in the within proceedings and the attorney prepared a brief and advised the bankrupt that the said interest was not an asset and that therefore it need not be scheduled; and I concluded therefrom that the bankrupt was not guilty of any bad faith or concealment of assets or of intentionally making a false oath, and that therefore an order should not be made revoking the discharge of the bankrupt.

The facts pertaining to the within controversy are not in dispute and are extensively set forth in the Opinion and in the Findings of Fact, the respective counsel herein differing as to the application of the law thereto.

The following documents are attached hereto:

1. Petition for Order to Show Cause.
2. Order to Show Cause.
3. Petition for Order Revoking Discharge.
4. Order to Show Cause.

5. Answer of Bankrupt, Charles Ralph Sentney, to Petition for Order to Show Cause for Turn Over Proceedings and Bankrupt's Return to Order to Show Cause Granted thereon on October 7, 1943.

6. Answer of Bankrupt, Charles Ralph Sentney, to Trustee's Petition for an Order Revoking the Discharge and Bankrupt's Return to the Order to Show Cause issued October 7, 1943, thereon. [153]

7. Brief of Bankrupt.
8. Trustee's Opening Brief.
9. Bankrupt's Reply Brief.
10. Trustee's Reply Brief.
11. Order (Opinion).
12. Findings of Fact, Conclusions of Law and Order.
13. Petition for Review.

14. Reporter's Transcript of first examination of bankrupt, held November 4, 1942.

15. Reporter's Transcript of Order to Show Cause Proceedings, October 13, 1943.

16. Trustee's Exhibit No. 1.

17. Trustee's Exhibit No. 2.

Dated: February 4, 1944.

Respectfully submitted,

Hubert L. Laugharn

HUBERT F. LAUGHARN,

Referee in Bankruptcy.

[Endorsed]: Filed Feb. 4 - 1944. [154]

In Bankruptcy—No. 41,495-H.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of

CHARLES RALPH SENTNEY.

Bankrupt.

ORDER AFFIRMING THE ORDERS OF THE REFEREE (1) DENYING TRUSTEE'S MOTION TO VACATE DISCHARGE OF BANKRUPT; and (2) DENYING TRUSTEE'S PETITION FOR TURNOVER ORDER AND DISMISSING ORDER TO SHOW CAUSE WITH RESPECT THERETO.

The trustee in bankruptcy herein, Harry Ashton, having filed his respective petitions for review, the first one being a petition to review the order of referee in bankruptcy, Hubert Laugharn, denying the motion of the trustee in bankruptcy to vacate and set aside the bankrupt's discharge; and second, the trustee's review of an order of referee in bankruptcy, Hubert Laugharn denying the application of the trustee for an order requiring the bankrupt and the First National Bank of Santa Ana, California, to turn over certain property, and the dismissal of the order to show cause with regard thereto.

The respective parties to this proceeding appearing, the trustee in bankruptcy by his counsel, Earl E. Moss and Louis Lombardi, and the bankrupt appearing by his counsel, Rupert B. Turnbull and Martin Goldman, and written briefs having been filed by the respective parties and the Court having listened to oral arguments in addition thereto, now therefore,

It Is Hereby Ordered, Adjudged and Decreed:

1) That the order of the referee sought to be reviewed denying the motion of Harry Ashton, Trustee herein, to vacate and set aside the order of the bankrupt's discharge be and hereby is affirmed and the [155] review of said order sought by the trustee be and the same is hereby denied.

2) That the order of the referee denying the application of the trustee in bankruptcy, Harry Ashton, for an order requiring the bankrupt, Charles Ralph Sentney, and the First National Bank of Santa Ana, California, to turn over property to Harry Ashton, trustee in bankruptcy, be and the same is hereby confirmed and approved and the order dismissing the order to show cause in regard thereto be and the same is hereby confirmed and approved; the review of the trustee in bankruptcy from said orders be and each of them hereby is denied.

Done in open Court this 29 day of March, 1944.

H. A. Hollzer

United States District Judge

Approved as to form:

Rupert B. Turnbull

Attorney for Bankrupt

Earl E. Moss & Louis Lombardi

By Earl E. Moss

Attorneys for Trustee in Bankruptcy,

Harry Ashton

Judgment entered Mar. 29, 1944. Docketed Mar. 29, 1944. C. O. Book 24, Page 309. Edmund L. Smith, Clerk. By L. Wayne Thomas, Deputy.

[Endorsed]: Filed Mar. 29, 1944. [156]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT
OF APPEALS.

Notice is hereby given that Harry Ashton, as Trustee in Bankruptcy in the above entitled matter, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order Affirming the Orders of the Referee (1) Denying Trustee's Motion to Vacate Discharge of Bankrupt; and (2) Denying Trustee's Petition for Turnover Order and Dismissing Order to Show Cause With Respect Thereto, entered in this proceeding on the 29th day of March, 1944 in Civil Order Book No. 24 at Page 309 in the office of the Clerk of said Court.

Dated: April 20th, 1944.

Earl E. Moss and Louis Lombardi

By Earl E. Moss,

Attorneys for Appellant.

[Endorsed]: Filed Apr. 20, 1944. [157]

[Title of District Court and Cause.]

DESIGNATION OF PORTION OF RECORD AND
STATEMENT OF POINTS.

Now comes appellant in the above entitled matter and herewith designates the following as those portions of the record and proceedings herein which he deems should be contained in the record on appeal in this cause to the United States Circuit Court of Appeals for the Ninth Circuit.

1. Trustee's Petition for an Order revoking discharge of Bankrupt.

2. Petition of Trustee for Order to Show Cause why the petitioning Trustee is not the owner of the Bankrupt's beneficial interest in Trust No. 245.

3. Answer of Bankrupt to petition for order revoking discharge.

4. Answer of Bankrupt to petition for Order to Show Cause Re ownership of beneficial interest in Trust No. 245.

5. Order of Referee denying petition for an order vacat- [158] ing Bankrupt's discharge and order denying that Trustee is entitled to the beneficial interest of Bankrupt in Trust No. 245, together with findings of fact and conclusions of law of Referee respecting the two foregoing orders.

6. Petition of Trustee for review of the foregoing orders of Referee.

7. Order of District Judge affirming the foregoing orders of Referee which Order of the District Judge was entered in the office of the Clerk of said Court on March 29th, 1944, in Civil Order Book No. 29 at Page 309.

8. All exhibits offered and received in evidence at hearing before the Referee on Trustee's petition for or-

der revoking Bankrupt's discharge and the hearing on order to show cause Re beneficial interest in Trust No. 245.

9. Testimony of Charles Ralph Sentney, Bankrupt and of Martin Goldman taken by Kate W. Lieden, Reporter at hearings before Referee on Trustee's petition for order revoking discharge and testimony of said witnesses at hearing before Referee on Trustee's petition for order to show cause Re beneficial interest in Trust No. 245.

10. Notice of Appeal.

11. This Designation of Portion of Record and Statement of points.

POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

1. The District Judge erred in adopting and approving Conclusion Number I of the findings of fact and conclusions of law in the proceeding to revoke the discharge of the Bankrupt wherein the Referee concluded that on the date of the commencement of the bankruptcy proceedings and for six months thereafter, the Bankrupt had no property interest in Trust No. 245 with the First National [159] Bank of Santa Ana, California, which the Bankrupt could by any means have transferred and that there was no property in said trust which could or did pass by operation of law to the Trustee in Bankruptcy.

2. The District Judge erred in failing to find that on the date of the commencement of the proceedings in Bankruptcy, the Bankrupt's interest in said Trust No. 245 with the First National Bank of Santa Ana, California, was property which the Bankrupt could by any means have transferred.

3. That the District Judge erred in adopting conclusion Number III of the Findings of Fact and Conclusions of Law of the Referee, wherein the Referee concluded that the Bankrupt was not guilty of any bad faith or concealment of assets or knowingly or intentionally making a false oath.

4. That the District Judge erred in failing to find that the Bankrupt was guilty of bad faith and was guilty of knowingly and intentionally making a false oath.

5. That the District Judge erred in failing to find that the advice of the Bankrupt's counsel on which the Bankrupt relied in stating in Schedule B-4 that he had no property in expectancy and no property held in trust for him, was contrary to the law and that said advice was given knowingly and intentionally and in bad faith.

6. That the District Judge erred in adopting conclusion IV of the Findings of Fact and Conclusions of Law of the Referee in the proceeding to revoke the discharge of the Bankrupt where the Referee concluded that the petition for an order revoking the discharge of the Bankrupt should be denied.

7. That the District Judge erred in refusing to make an order revoking the discharge of the Bankrupt.

8. That the District Judge erred in adopting and approving finding Number I made by the Referee in the Findings of Fact and [160] conclusions of law on the proceeding for an order declaring the Trustee to be the owner of a beneficial interest in said Trust No. 245 with the First National Bank of Santa Ana, California, in which finding the Referee held that on the date of the commencement of the bankruptcy proceedings the bankrupt had no interest in said Trust No. 245, which he could by any means have transferred or have passed by operation of law to the Trustee in Bankruptcy.

9. That the District Judge erred in finding that on the date of the commencement of the Bankruptcy proceedings the Bankrupt had an interest in said Trust No. 245, which he could by any means have transferred and have passed by operation of law to the Trustee in Bankruptcy.

10. That the District Judge erred in adopting finding Number III made by the Referee in Bankruptcy at the proceeding to declare the Trustee in Bankruptcy the owner of the said interest in Trust Number 245 in which finding the Referee found that on the date of the commencement of this proceeding and for six months thereafter, the Bankrupt had no interest in said Trust No. 245, which passed by law to the Trustee in Bankruptcy.

11. That the District Judge erred in adopting and approving Conclusion number I made by the Referee in Bankruptcy in the Findings of Fact and Conclusions of Law on the proceeding to declare the Trustee in Bankruptcy the owner of the said Trust Number 245, in which Conclusion the Referee concluded that the petition of the Trustee for an order requiring said First National Bank of Santa Ana, California and the Bankrupt to convey to the Trustee in Bankruptcy the Bankrupt's interest in said Trust No. 245, should be denied.

12. That the District Judge erred in failing to conclude that the said petition of the Trustee in Bankruptcy for an order requiring the said First National Bank of Santa Ana, California, and the said Bankrupt to convey to the Trustee in Bankruptcy his [161] interest in said Trust No. 245, should be granted.

13. The District Judge erred in adopting Conclusion Number II by the Referee in Bankruptcy in the findings of fact and conclusions of law in the proceeding to de-

clare the Trustee in Bankruptcy the owner of said interest in said Trust No. 245, in which Conclusion the Referee concluded that the Trustee in Bankruptcy was not the owner of any interest in the said Trust No. 245 or any of the proceeds thereof.

14. That the District Judge erred in failing to conclude that the Trustee in Bankruptcy was the owner of the Bankrupt's interest in said Trust No. 245 and the proceeds thereof.

15. That the District Judge erred in adopting the Order of the Referee in Bankruptcy made in the two proceedings, to-wit: The proceeding to revoke the Bankrupt's discharge and the proceeding to declare the Trustee in Bankruptcy the owner of the Bankrupt's interest in said Trust No. 245, in which order the said Referee denied the petition of the Trustee in Bankruptcy for an order setting aside and revoking the discharge of the Bankrupt, and denied the petition of the Trustee for an Order that he was the owner of the Bankrupt's interest in said Trust No. 245.

16. That the District Judge erred in refusing to order that the discharge of the Bankrupt be set aside and revoked and in refusing to Order that the Trustee in Bankruptcy is the owner of said interest in said Trust Number 245 and in refusing to order that the said First National Bank of Santa Ana, California, and the said Bankrupt convey said interest in said Trust Number 245 to the Trustee in Bankruptcy.

Dated: April 20th, 1944.

EARL E. MOSS and LOUIS LOMBARDI,

By Louis Lombardi

Attorneys for Appellants.

[Endorsed]: Filed Apr. 20, 1944. [162]

[Title of District Court and Cause.]

SUPPLEMENTARY DESIGNATION.

Now comes appellant in the above entitled matter and files this his supplementary designation of portions of the record which should be contained in the record on appeal of said cause to the United States Court of Appeals for the Ninth Circuit, and makes the following additional designations:

1. Debtor's petition, filed October 16, 1942.
2. Adjudication of Bankrupt.
3. Order of Reference.

Dated this 11th day of May, 1944.

EARL E. MOSS and LOUIS LOMBARDI,
By Louis Lombardi.

[Endorsed]: Filed May 12, 1944. [163]

[Title of District Court and Cause.]

ADMISSION OF SERVICE OF DESIGNATION
OF PORTIONS OF RECORD AND STATE-
MENT OF POINTS AND SUPPLEMENTARY
DESIGNATION.

Service of Appellant's Designation of Portions of Record and *State* of Points and Supplementary Designation admitted this 18 day of May, 1944.

Rupert B. Turnbull

Attorney for Respondent.

[Endorsed]: Filed May 18, 1944. [164]

[Title of District Court and Cause.]

ORDER.

It appearing from the affidavit of Earl E. Moss, one of the attorneys for the Appellant in the above entitled matter that it is necessary that the time be extended for docketing the appeal in the office of the Clerk of the Circuit Court of Appeals of the Ninth Circuit,

It Is Therefore Ordered that the time for docketing said appeal be and is hereby extended to and including the 10th day of June, 1944.

Dated May 25, 1944.

H. A. Hollzer
Judge

[Endorsed]: Filed May 25, 1944. [165]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 165 inclusive contain full, true and correct copies of: Debtor's Petition in Bankruptcy; Order of Adjudication and of General Reference; Petition for Order Revoking Discharge; Petition for Order to Show Cause; Answer of Bankrupt to Trustee's Petition for an Order Revoking the Discharge and Bankrupt's Return to the Order to Show Cause Issued October 7, 1943, Thereon; Answer of Bankrupt to Petition for Order to Show Cause for Turnover Proceedings and Bankrupt's Return to Order to Show Cause Granted Thereon on October 7, 1943; Trustee's Exhibits 1 and 2; Order of Referee Dated December 6, 1943; Findings of Fact and Conclusions of Law and Order; Petition for Review; Referee's Certificate on Review; Order Affirming the Orders of the Referee (1) Denying Trustee's Motion to Vacate Discharge of Bankrupt; and (2) Denying Trustee's Petition for Turnover Order and Dismissing Order to Show Cause with Respect Thereto; Notice of Appeal; Designation of Portion of Record and Statement of Points; Supplementary Designation; Admission of Service of Designation, etc.; and Order, which, together with one volume of Reporter's Transcript transmitted herewith, constitute the rec-

ord on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$40.25 which sum has been paid to me by Appellant.

Witness my hand and the seal of said District Court this 7 day of June, 1944.

[Seal]

EDMUND L. SMITH, Clerk

By Theodore Hocke

Deputy Clerk

In the District Court of the United States,
Southern District of California.

Central Division

Before: Honorable Hubert F. Laughran, Referee in
BANKRUPTCY.
In Bankruptcy
No. 41,495-H

IN THE MATTER OF

CHARLES RALPH SENTNEY.

A BANKRUPT.

Reporter's Transcript of Proceedings Had and Taken in
the Above Entitled Matter, on October 13, 1943.

Appearances:

Earl E. Moss, Esq.,

841 So. Serrano—DR. 3111

Los Angeles, California

and

Louis Lombardi, Esq.,

528 Associated Realty Bldg.—TR. 3051

Los Angeles, California,

For the Trustee, Harry Ashton, Esq.

Rupert B. Turnbull, Esq.,

400 Title Insurance Bldg.—MU. 6312

Los Angeles, California

and

Martin Goldman, Esq.,

9000 Sunset Blvd—BR. 2-4038

Los Angeles, California,

For the Bankrupt, Charles Ralph Sentney.

A. M. Bradley, Esq.,

Santa Ana, California,

For the First National Bank of Santa Ana.

Charles Ralph Sentney

October 13, 1943.

Order to Show Cause re Discharge
Order to Show Cause re a Certain Trust.

The Referee: Charles Ralph Sentney.

Mr. Moss: The Trustee is ready.

Mr. Goldman: If the Court please, I want to associate Judge Turnbull as associate counsel for the bankrupt.

The Referee: Who is appearing on behalf of the Trustee?

Mr. Moss: Myself and Mr. Lombardi.

The Referee: And this is the Trustee's order to show cause?

Mr. Moss: There are two: I was just wondering whether it wouldn't be well to consolidate them. I imagine much of the testimony would apply to both. There is a petition for an order revoking the discharge and a petition for an order adjudging the trustee to be the owner of a certain trust.

Mr. Turnbull: We will object to the consolidation, because different rules of the burden of proof apply, but we will stipulate the evidence can be used in the two proceedings without re-introducing it. In one proceeding the evidence would have to show criminal intent and in the other it would not, but I don't believe we should have to put the two evidences in separately. Can we have a stipulation on that?

Mr. Moss: The stipulation that the evidence may apply to each is satisfactory.

Mr. Turnbull: So accepted. [2*]

*Page number appearing at foot of Reporter's Transcript.

Mr. Bradley: I appear on behalf of the First National Bank of Santa Ana, in response to an order to show cause.

The Referee: It would seem to follow that attention should first be given to the turnover order and if that is not supported then it would seem to follow that the other would fall without further contention.

Mr. Moss: I would not like Your Honor to have any idea that that is the law, because there is ample authority to the effect that it was the duty of the bankrupt to schedule this asset, irrespective of the fact that the Trustee might not recover it, and there is also ample authority to the effect that any fraud or any fact which would have entitled the Trustee to have an order made denying the bankrupt's discharge is sufficient to revoke his discharge, so then if it is true that the Trustee would not be entitled to this, still it was the duty of the bankrupt to schedule it, and by reason of his failure to schedule it we are entitled to have his discharge revoked. I will submit my authorities later.

Mr. Turnbull: Would it make it any easier for Your Honor if we state our position? We have filed the returns.

The Referee: I am just going through them now. My remarks may be qualified with the thought Mr. Moss has given. I have no pre-conceived idea about it.

Mr. Moss: I have no objection to proceeding with the turnover order first. With counsel's stipulation I think [3] we can go right ahead.

Mr. Moss: Will you take the stand, Mr. Sentney?

Mr. Turnbull: I asked the Court if it would make any difference if we stated our positions.

The Referee: I think you might as well let the Trustee put on his case.

CHARLES RALPH SENTNEY

having been first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Moss:

Q. You are the bankrupt in this proceeding, Charles Ralph Sentney? A. I am.

Q. Did you know W. A. Huff and Edith Huff in their lifetime? A. I did.

Q. Were they any relation to you?

A. She was my aunt and he was her husband—aunt and uncle.

Q. Where did they reside? A. At Santa Ana.

Q. California? A. Yes.

Q. How long have you resided in California?

A. Since about 1922 or '23, maybe a little earlier than that, 1921. [4]

Q. When you first came to California did you have occasion to call upon Mr. and Mrs. Huff?

A. Yes sir.

Q. Where did you reside in California at that time?

A. At the Stanford University.

Q. How long did you reside there?

A. One term; that is one year.

Q. Then where did you go to reside?

A. Los Angeles.

Q. How long did you continue to reside in Los Angeles?

A. Ever since. Well, I—there was a time I was in Santa Barbara, maybe four or five months.

Q. In other words, since about 1924 you have continued to reside in Los Angeles? A. That's right.

(Testimony of Charles Ralph Sentney.)

Q. What time did W. A.—what was the date of the death of W. A. Huff?

A. It was in 1927, I think October, might have been November, 1927.

Q. What was the date of the death of Edith Huff?

A. April 20, 1943.

Q. Now from 1924 on, how frequently did you see W. A. Huff and Edith Huff?

A. Well, I would say on an average of once a month during his lifetime. I saw her oftener than that afterwards.

Q. Did you say W. A. Huff died in 1927? [5]

A. I believe that is the date, yes sir.

Q. What part of the year 1927 did he die?

A. In the latter part; I am not sure of the year, could have been 1927 or 1928, but I believe it was in October.

Q. October of 1927? Are you familiar with the trust that he created and Mrs. Huff created, with the First National Bank of Santa Ana, on May 10, 1927?

A. I am familiar with the one he had created at the time of his death.

Q. When did you first learn he had created that trust?

A. After his death. Well, I knew there was one but I didn't know what it was.

Q. When did you first learn there was a trust?

A. During his illness.

Q. His last illness? A. Yes sir.

Q. Did you learn more of the details after his death?

A. Yes sir.

Q. How long after his death?

A. Well, very shortly. I would say within thirty days.

Q. What did you learn then?

(Testimony of Charles Ralph Sentney.)

A. I learned that there was a trust created by his wife and himself in connection with the property they had, and in order to have the property managed for her and in order to distribute the income to her and to heirs on his side of the family. [6]

Q. How did you secure that information?

A. She gave it to me.

Q. She gave you a copy of the trust?

A. I saw a copy of the trust. She showed it to me.

Q. And you read it over at that time?

A. Yes sir.

Q. Did you take a copy away with you?

A. I had one for some time, to familiarize myself with it, there had been some changes—

Q. Well,—

Mr. Turnbull: He didn't finish his answer.

A. —As I said, there had been numerous changes and it took time to go over it and see what was in effect at that time in the way of amendments that were made since they created it; there were several amendments.

Q. When was it you studied it over?

A. Within the first thirty days after his death.

Q. Now, then, from that time on, how often did you have occasion to see Mrs. Huff?

A. Very often. I would say during the past ten or twelve years on an average of six months in the year I was seeing her daily.

Q. Where were you living at that time?

A. At which time?

Q. The time immediately following his death up to the time of her death. [7]

(Testimony of Charles Ralph Sentney.)

A. I lived several places. At the time of her death I was living next door to her.

Q. How long had you lived there?

A. About ten or twelve years.

Q. Where was she living at that time?

A. 8855 St. Ives Drive, Los Angeles.

Q. And she had lived there for about twelve years?

A. Off and on, except when she went to Balboa. She had a home in Balboa and I didn't see her when she went there.

Q. And you had lived in your residence for twelve years?

A. Yes, sir.

Q. And you saw her practically every day?

A. When she was in Los Angeles, yes sir.

Q. Did she consult you concerning her property matters?

A. In many instances, yes sir.

Q. Did you testify in your first examination here that you were employed by someone concerning property, advising?

A. Not employed, no. Not to my knowledge.

Q. Didn't you testify you were advising some lady about her property matters?

Mr. Turnbull: That is objected to as no foundation laid for such impeachment. The gentleman is entitled to look at the transcript of his testimony before he testifies.

The Referee: Overruled. If the exact testimony becomes necessary we will have to have access to that; this will just test his memory. [8]

By Mr. Moss:

Q. It is my recollection that you made some reference to some one whom you were advising concerning property matters.

A. Adelaide Ross.

(Testimony of Charles Ralph Sentney.)

Q. That was not Mrs. Huff?

A. No. I was employed by Adelaide Ross to manage her property for her. She owns a lot of property in the district I am in.

The Referee: I recall your reference to that. I don't recall anything being mentioned about Mrs. Huff.

Witness: I was never paid by Mrs. Huff for anything. It was just a matter by way of advice. If she had anything in her mind regarding her income she might have asked me about it, or she might not have.

By Mr. Moss:

Q. You were familiar with the various changes in the trust that she made from time to time?

A. No; some of them I was. There were some I apparently didn't know about.

Q. Were you ever consulted concerning the price at which any of the property in the trust should be sold?

A. Subsequent to her death?

Q. At any time.

A. I don't think she could sell any during her life. Subsequent to her death, yes sir, I was asked about it, as [9] to what I thought the values were, and what they should be.

Q. That was only subsequent to her death?

A. Well, there was one time when she wanted to dispose of her house up here. She thought she might want to go back to Santa Ana, and we discussed what the house could be sold for and what a house could be bought for in Santa Ana, but it was just a matter of discussion.

Q. Now when you filed your petition in bankruptcy—prior to filing it, you took a copy of this trust to your attorney, did you?

(Testimony of Charles Ralph Sentney.)

A. I discussed the matter with him, yes sir.

Q. You took a copy of the trust and you discussed its effect?

The Referee: Just one moment—will you split that question up?

Mr. Turnbull: We will stipulate—

The Referee: Just a moment; just read the question.

By Mr. Moss:

Q. You took a copy of the trust to your attorney's office?

A. Well, I think I discussed it with him at the time I went in there; as a matter of fact I know I did.

Q. What did you tell him?

A. I told him I knew at one time, when the trust was created, I had been mentioned in the trust. I said I knew I couldn't do anything with the interest I had, and didn't [10] know whether I had it at that time, but I had no way of knowing.

Q. Is that all you told him?

A. Well, I don't at this time remember any other discussion about it.

Q. Is there any way by which you could refresh your recollection?

A. No, I don't know of any at the moment.

Q. In other words, as far as you now remember, and you have no other means of refreshing your recollection, you have told us everything you told Mr. Goldman at the time you first discussed the matter with him?

A. Regarding this trust?

Mr. Turnbull: Limit your question to a particular time.

(Testimony of Charles Ralph Sentney.)

Q. Yes sir, I want to know about the first time you discussed your matters with Mr. Goldman.

A. Is it in connection with the bankruptcy, you mean?

Q. Yes sir.

A. I had an opportunity at one other time to discuss the trust with him, but not my interest.

Q. You mean prior to the bankruptcy proceeding?

A. Yes; but it had no connection with me; it was in connection with a matter of income division on one member of my uncle's portion of the family. I discussed it with him then, and at that time I took the copy that my aunt had to him and went over it with him, but you were asking me in [11] connection with the time I discussed this with him—

Q. When was that?

A. Oh, I would say possibly a year or eighteen months previous to the time I filed bankruptcy.

Q. How did you happen to be active in that matter?

A. Well, because one of the interested parties, I don't know what you would call them, on my uncle's side, had died. There was a division of this income between his heirs and my aunt, and one of those heirs died and there was a question in her mind as to whether or not she had a right to the income of that person who had died as long as she lived, instead of his heirs having it divided among them, and I discussed it with him and we subsequently arrived at an agreement with the heirs on his side of the family regarding the income of that one person that was deceased.

Q. And in that matter you were representing Mrs. Huff?

(Testimony of Charles Ralph Sentney.)

A. Yes; she was not well at the time.

Q. Did you represent her in any other matters concerning the trust?

A. Income matters, several times, yes sir.

Q. Did you have occasion to discuss the matter of the trust with the trust officers of the First National Bank of Santa Ana frequently?

A. Yes sir, I have discussed it with them. In connection with income only. That was one place I had gone for her.

Q. Now going back to the first occasion that you discussed your bankruptcy with Mr. Goldman, have you told us all that you told him about the trust matter?

A. As near as I can remember, yes. I described what the provision was as I understood it.

Q. Did he then proceed to prepare your schedules in bankruptcy? A. That's right.

Q. And you signed, filed and swore to the schedules that are on file in their present form? A. I did.

Q. Did you have any other discussion of the trust with Mr. Goldman before you signed and filed them?

A. My attorney told me I had no interest in this Huff trust, number 245; that I had no interest at all in it.

Q. At that time did he have a copy of the trust?

A. Well, as I remember it—

Q. What I am anxious to know is this—

Mr. Turnbull: He is entitled to answer the question.

Mr. Moss: I will withdraw the question.

(Testimony of Charles Ralph Sentney.)

By Mr. Moss:

Q. What I would like to know is this: If Mr. Goldman didn't have a copy of that trust before him, how could he be so positive?

Mr. Turnbull: Object to that; this witness has heretofore said that he had given Mr. Goldman a copy of that trust before. [13]

The Referee: I will overrule the objection. The question is somewhat argumentative but I think it should be permitted. Ask it again.

By Mr. Moss: I will withdraw that question.

Q. At the time that you had the discussion with Mr. Goldman and he rendered you the opinion that you had no interest that should be mentioned in your schedules, didn't you have a copy of the trust there?

A. I don't believe I did, but I know at the time I had taken the matter up previously with him in connection with this income thing and I believe Mr. Goldman made a copy of it at that time, but I didn't take one to him at that time.

Q. Well did he, at that time of preparing your petition in bankruptcy, and at the time you were discussing the matter did he bring out the copy and discuss it with you?

A. I don't remember that. I would be inclined to say that he did, but I don't know. I asked him for an opinion and he rendered an opinion on it.

Q. Did you have any further discussion after the filing of your petition? A. Not to my knowledge.

(Testimony of Charles Ralph Sentney.)

Q. Did you at any later time discuss the matter of whether or not a reference to the trust should have been included in your petition with Mr. Goldman? [14]

A. Not until this matter came up.

Q. Did Mrs. Huff have a copy of the trust at her house? A. Yes sir.

Q. Did she frequently bring it out to discuss it with you? A. No.

Q. Did you ever look over the copy of the trust she had at her house? A. Yes.

Q. When was the last time, prior to her death, that you looked it over?

A. I think it was the time I took it over to Mr. Goldman on this income matter.

Q. That was about eighteen months before you filed your petition in bankruptcy?

A. I believe it was about that.

Q. And you read over the trust at that time?

A. No, I didn't. It is a pretty long instrument.

Q. You knew the provisions it contained concerning yourself?

A. I knew the original provisions it contained concerning myself.

Q. At the time you took it over to Mr. Goldman you then learned of the provisions it contained then about yourself?

A. As far as the copy was concerned, but I don't know that there were any new provisions on the one she had.

Mr. Moss: That is all. [15]

(Testimony of Charles Ralph Sentney.)

Cross-Examination

By Mr. Turnbull:

Q. This trust that you refer to, there is only one trust under this number, as far as you know?

A. As far as I know, yes.

Q. You have referred several times to the condition that the trust was in at certain times. Have you learned since that during her lifetime Mrs. Huff made amendments to the trust and filed them in the office of the First National Bank of Santa Ana, as trustee?

A. That is right.

Q. Have you at any time since the creation of this trust in 1927 received any money from it?

A. No sir.

Q. Have you received any property from it?

A. No sir.

Q. Have you received any benefits of any kind from it?

A. No sir.

Q. At the time of the filing of your bankruptcy, Mrs. Huff was a living person?

A. That is right.

Q. During all of the times you were before this court in the bankruptcy proceedings and for fully six months after your adjudication, she was a living person?

A. That is correct.

Q. Were you familiar, at the time you filed your bank- [16] ruptcy schedules of the recital in the trust that no person other than Mrs. Huff could alienate or anticipate or do anything with the property, the subject matter of the trust?

A. That is right.

(Testimony of Charles Ralph Sentney.)

Q. You knew that? A. Yes sir.

Q. Were you familiar, also, with the recital in the original trust that no conveyance could be made?

Mr. Moss: I will stipulate he is familiar with the entire contents.

Mr. Turnbull: That is enough from this witness.

Mr. Moss: At the time of the filing of the petition in bankruptcy he was familiar with the entire contents of the trust.

Mr. Turnbull: I will stipulate he knew about the original trust, but I am going to prove he didn't know about certain amendments which cut him off.

The Referee: You had better ask the question.

By Mr. Turnbull: Q. You were familiar with the terms of the original trust of May 10, 1927, at the time of your bankruptcy? A. I was.

Q. After Mrs. Huff's death did you learn of any amendments that you were not familiar with at the time of the bankruptcy; any amendments to the trust?

A. Yes sir. [17]

Q. I think this morning when the trust officer showed you an amendment you said you had not known about that? A. That is right.

Mr. Turnbull: We will identify those later on in a different manner. That is all for the cross-examination of this witness. We will probably call him later on as our own witness in the defense.

By the Referee: Q. Mr. Sentney, did you receive any loans or advances or gifts from Mr. and Mrs. Huff during their life?

A. Oh, I have had gifts from them, yes sir.

(Testimony of Charles Ralph Sentney.)

Q. Of what size and what character?

A. Oh, I don't know—over that period of time there were—

Q. Did you receive any from Mrs. Huff after Mr. Huff's death?

A. Nothing that was—nothing out of the ordinary gifts from her.

Q. Did you receive any advances against your interest in the trust? A. No sir.

Q. You didn't receive any prepayment or anything to go against your— A. No sir.

Redirect Examination

By Mr. Moss:

Q. You knew at the time you filed your petition [18] in bankruptcy that upon the death of Mrs. Huff you would be entitled to receive some of the residuum—some of the corpus of the trust?

Mr. Turnbull: That is an attempt to vary the terms of the instrument. That written instrument is an express trust under the California Code, and it cannot be varied by oral evidence. Either he gets it or he doesn't get it. We will have to test the sufficiency of that document under the law. It is not my idea or the witness' idea of it.

The Referee: Yes, I think that should be sustained. Possibly he was going to get something, but what he knew is another point. I will sustain that.

Mr. Moss: No further questions.

The Referee: That is all, Mr. Sentney.

(Witness excused.)

Mr. Moss: Is the trust officer of the bank here?

L. S. MORTENSON

having been first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Moss:

Q. What is your business, Mr. Mortenson?

A. Trust officer of the First National Bank of Santa Ana.

Q. And as such trust officer are you familiar with a certain Declaration of Trust, known as Trust No. 245 of the First National Bank of Santa Ana?

A. Yes sir. [19]

Q. How long have you been such a trust officer?

A. Eight years.

Q. Were you acquainted with Edith Huff during her lifetime?

A. Just slightly; she called in very seldom.

Q. Since you have been such trust officer have you been familiar with this trust? A. Yes sir.

Mr. Moss: I took the copy that Mr. Goldman loaned me and I had a copy made.

Mr. Turnbull: We have an exact carbon copy that we will offer you, if you want to substitute it.

Mr. Moss: All right.

(Mr. Turnbull hands document to Mr. Moss.)

Mr. Turnbull: I prefer to use the one we know is a carbon.

Mr. Moss: All right

Mr Turnbull Do you want the amendments also?

Mr. Moss: I think probably the complete trust, at least to the date of filing the petition in bankruptcy.

Mr. Turnbull: I have handed counsel what we understand is one of the carbon copies of the original, without signatures however, in certain instances.

(Testimony of L. S. Mortenson.)

Mr. Moss: Well, accepting counsel's statement that this is a correct copy, I offer it in evidence.

The Referee: All right.

[Trustee's Exhibit No. 1 will be found at the end of the testimony, p. 112.]

Mr. Turnbull: Will it be stipulated that the signatures, where they do not occur, did occur in the original?

Mr. Moss: If you say they did.

Mr. Turnbull: I don't know; I haven't seen it.

The Referee: We will take a short recess, and you may check it.

Mr. Moss: Or the witness might have it.

The Referee: You can check it during the recess.

Mr. Turnbull: For the purpose of informing parties and counsel, I understand that does not contain the balance of the amendments.

Mr. Goldman: I think it does. (To the witness) Did I get all of the amendments after Mrs. Huff's death?

Witness: That is my understanding.

Mr. Moss: Would you take a look at that, Mr. Mortenson?

Witness: (Looking at instrument) Yes sir, although it is rather difficult to compare them with these amendments; all of these are amendments—eight amendments.

Mr. Turnbull: There are eight amendments to the trust?

Witness: Yes sir; some of which amendments were revoked in their entirety; others are now effective.

Mr. Moss: It was my purpose when I had my copy made, to copy it completely, and I supposed this copy was more or less a complete copy with all of the amendments added to it.

(Testimony of L. S. Mortenson.)

Witness: We can compare and find out if all of the amendments are in there. [21]

The Referee: We will take a short recess, Mr. Mortenson, if you want to check that over, or you may do it later if you want to.

Mr. Moss: I would just as soon take a recess now and we will get this past us.

(Whereupon a recess was had.)

(The recess over L. S. MORTENSON resumes the stand.)

By Mr. Moss:

Q. After a comparison of the copy that was introduced in evidence, did you find that one amendment was not included?

A. That is correct; one amendment dated July 3, 1928.

Mr. Turnbull: Counsel, do you have it there?

Mr. Moss: No, I don't have it. While I don't know that it applies to this bankrupt's interest, yet I think we should have the trust complete.

Mr. Turnbull: I do too.

Mr. Moss: Will you, Mr. Witness, when you get back to your office, make and send me three copies, if you will please; one for the Trustee, one for myself, and one for my associate, and then one to be filed with the court as an exhibit?

Witness: Yes sir.

Mr. Bradley: Mr. Mortenson, would you make one for me?

Witness: Yes.

(Testimony of L. S. Mortenson.)

Mr. Moss: And mail those in and then I will ask permission to add that to the exhibit, or make it another exhibit [22] when it is received.

The Referee: Well, if it is agreeable, coming from the bank, I will just attach it.

Mr. Moss: Mail the copy to the court.

Mr. Turnbull: I will stipulate that if that is done it may be marked without further formality, to the exhibit.

The Referee: All right. If that is agreeable I will just clip it in.

Mr. Moss: I think that is all.

Cross-Examination

By Mr. Turnbull:

Q. Mr. Mortenson, after the death of Mrs. Huff did Mr. Goldman get a copy of this trust from you; a copy of the amendments, rather?

A. Yes; I think they had some of the amendments and possibly the original, but we attempted to complete their file, as I recall it.

Q. Does your record show that the bankrupt herein, Charles Ralph Sentney, ever received any money or anything of value from this trust?

A. Nothing whatever.

Q. This exhibit that is missing, you have the original here? A. Yes sir.

Q. Does that change the beneficiaries, generally?

A. Yes sir; the income beneficiaries on Mr. Huff's side [23] but it has no effect upon the interests of Mrs. Huff's part of the trust.

Q. These amendments which are offered in evidence and the one which will be in evidence, were made from time to time after the creation of the original trust?

(Testimony of L. S. Mortenson.)

A. Yes sir.

Q. Will you give us the dates of the amendments as executed by the grantors of the trust?

A. Yes sir. The first amendment was dated the 18th of February, 1927.

Q. Did that change any of the beneficiaries?

A. No; that had to do with the powers of the trust.

Q. Changed the powers of the trust?

A. Yes sir.

Q. The next one.

A. The next one is dated the 20th of October, 1928.

Q. Did that change any of the beneficiaries?

A. It didn't change the beneficiaries; it merely set up the fund for the purpose of caring for the burial place of Mr. and Mrs. Huff.

Q. It created different expenditures than the original trust of some of the money in the trust?

A. That is correct.

Q. The next one.

A. The 3rd day of July, 1928.

Q. And that trust made other changes in the distribution [24] of the property?

A. Yes sir; as to Mr. Huff's side, or part of the trust.

Q. In other words certain persons that were distributees there was changes made as to what should be given to them out of the trust?

A. Yes sir.

The Referee: That is the one we don't have?

Witness: Yes sir.

Mr. Ashton: We have that one.

(Testimony of L. S. Mortenson.)

Mr. Moss: Not that same one, I don't think.

Mr. Turnbull: That is the one he has to send in.

Witness: Yes sir.

By Mr. Turnbull:

Q. Now calling your attention to the amendment in 1938—

Mr. Lombardi: 19-what?

Mr. Turnbull: I said 1938.

Witness: 1928.

Mr. Turnbull: Oh, that is a "2" instead of a "3"?

Witness: Yes sir.

Mr. Turnbull: I misread it.

Mr. Lombardi: That is all right.

Q. The date of that amendment is actually the 3rd of July, 1928, and was signed at that time by both Mr. W. A. Huff, Mrs. Edith Huff, and by the trustee bank, First National Bank of Santa Ana, was it? It appears to be acknowledged on that same day by the parties. [25]

A. Yes sir.

Q. Now that amendment again changed the distribution of property in the event Ethel Huff not be survived by any issue of her body, didn't it?

A. That is right.

Q. It also changed, with respect to Helen Parke?

A. Yes sir.

Q. Also with respect to Ethel Huff, C. S. Huff and others; it made other changes in the trust, didn't it; other conditions?

A. It changed slightly in that—

Q. I don't care what the nature of them are, but I mean they did make different distribution?

(Testimony of L. S. Mortenson.)

A. Yes sir. (Indicating) That is reciting the original clause, here is the amended part of it, here.

Q. And it provided an income at the rate of \$250 per month to be given to S. E. Huff and other people?

A. Correct.

Q. And this amendment is a part of the trust we have heretofore referred to as No. 245?

A. That is correct.

Q. Each of these amendments you have told us about, from time to time were made after May 10, 1927, and were made by the grantors or donors of that trust, Mr. and Mrs. Huff?

A. Either one or the other, or both. [26]

Q. And have the signatures of the trustee, First National Bank of Santa Ana, amending the trust thereby?

A. Correct.

Mr. Moss: Could I see that one we found that was omitted?

(Witness hands instrument to Mr. Moss.)

Witness: That seems to be it, doesn't it?

By Mr. Moss:

Q. It is practically identical, isn't it?

A. Yes sir.

Mr. Moss: The copy that my office made from the copy Mr. Goldman submitted to me contains the amendment that seems to be omitted from the copy that counsel for the bankrupt submitted to us that we have offered in evidence.

(Testimony of L. S. Mortenson.)

Mr. Turnbull: Let's take it out and put it in then.

Mr. Moss: I am just wondering how that happened. Isn't this the same one?

Mr. Goldman: I don't know. Didn't you make a copy of mine?

Mr. Moss: Yes.

Mr. Goldman: Then it must be right.

Mr. Ashton: I think we must have overlooked it in the copy the Court has.

Mr. Moss: That must be true. Isn't this the same copy that you submitted?

Mr. Goldman: That's right. [27]

Mr. Moss: There is no other way it could get in there than being copied from your copy. When the Court is through we will take a look at it again and see if it is in there.

The Referee: There are some other amendments here which were not testified to.

Mr. Moss: I think counsel just asked about a few amendments and then stopped. (To Mr. Turnbull) You didn't intend to cover all of the amendments, did you?

Mr. Turnbull: Oh, no. I asked him to give the dates of the amendments into the record.

The Referee: He didn't give them all. He got off on another subject.

Mr. Turnbull: Well, I did intend to, and I will, ask him to read in the dates of each amendment, later on.

(Testimony of L. S. Mortenson.)

Redirect Examination

By Mr. Moss:

Q. I will show you, as a part of Trustee's Exhibit "1"—it is hard to designate the page except by saying—

Mr. Turnbull: Paragraph, counsel?

Q. —there are, first twenty-two pages, and then an acknowledgment, then the pages start to number again and then there are eleven pages numbered again; then there are five unnumbered pages, and immediately following that there appears to be an amendment, made on the 10th day of May, 1927, which you and I have examined, and which seems to be a correct copy, doesn't it, of the amendment that we thought [28] was omitted?

A. Yes sir.

Mr. Turnbull: May I interrupt counsel and call attention to an error he has made—that is the July one, not the May one.

Mr. Moss: Oh, yes.

Mr. Turnbull: The instrument he actually refers to is dated the 3rd of July, 1928.

Mr. Moss: That is correct.

Witness: These are identical, though. That (indicating) is a copy of this amendment.

Q. So that it is here, but it is out of place, because immediately following it is one dated February 18, 1927?

A. That is correct.

Mr. Ashton: I would like to get cleared up how that one dated is dated February 18, 1927, when the original trust was created in May, 1927.

(Testimony of L. S. Mortenson.)

Q. Will you look at that amendment and see if that is the correct date, see if that is February 1927 or 1928?

A. That is a discrepancy which I can't explain, because the trust was in effect when I went to the bank.

Mr. Turnbull: What is the acknowledgment date, maybe that will clear it up?

Witness: 18th day of February, 1927. It is the same.

Q. Do you think possibly that could have been executed in 1928, and that could have been an error? [29]

A. It could have been.

Mr. Goldman: I think I can clear that up.

By Mr. Goldman:

Q. Isn't it true that at the time we compared this document in your office we checked the notary's records and found there was an error in the year; that that should have been dated 1928?

A. I know that matter came up; I had just forgotten it.

Q. It was a bank notary, and we checked that with the notary's books?

A. I had lost sight of that fact, but evidently it should have been 1928.

Mr. Turnbull: It was early in the year; sometimes we carry a year date over.

The Referee: I suggest that the witness go ahead and give the dates of the amendments. You have all read the one in controversy, October 1928 and July 1928; now if you can get through.

(Testimony of L. S. Mortenson.)

Witness: July 3, 1928; January 7, 1929. Another one dated the same date, January 7, 1929; August 29, 1934; May 29, 1935, and August 3, 1935.

The Referee: Any other questions?

Mr. Bradley: I would like to ask a few questions.

By Mr. Bradley:

Q. Mr. Mortenson, referring to paragraph Eleven of the original trust. [30]

Mr. Moss: You will find that on page 19.

Witness: Yes sir.

By Mr. Bradley:

Q. I would like to ask you, were the provisions in that paragraph changed by any of the subsequent amendments to the trust? A. No.

Mr. Moss: It is interesting to have the witness' opinion about the matter, but the documents speak for themselves.

Mr. Bradley: The documents speak for themselves, but I believe this paragraph is of utmost importance; it is the spendthrift provision. Might I read it?

The Referee: I don't believe it is necessary. We have it in evidence.

Q. Mr. Mortenson, when did you first hear of these proceedings in the matter of Charles Ralph Sentney, bankrupt? A. Last Friday.

Q. That was the time you were served with the order to show cause in this matter?

A. That was the day before we were served. Mr. Goldman called us and told us we would be served.

Mr. Bradley: That is all.

(Testimony of L. S. Mortenson.)

By Mr. Moss:

Q. At the time you prepared these various amendments, it was your practice to deliver a copy of the amendment each time to Mr. Huff, during his lifetime, and Mrs. Huff, after [31] his death?

A. That is correct.

Mr. Moss: That's all.

Mr. Turnbull: That's all.

The Referee: Any other witnesses?

Mr. Moss: That is all of the evidence we have.

Mr. Turnbull: With respect to the order to show cause relative to the application of the trustee to revoke the discharge, I do want to put some proof on on that.

Mr. Moss: Could I compare your answer? Do you deny our allegation that we had no knowledge?

Mr. Goldman: Information or belief; that is denied.

Mr. Turnbull: You say you were informed these things were fraud, and I set up if you got that information you were mistaken; there was no intent to defraud; there was no property concealed under the law and no property that could have been conveyed by the bankrupt, and no property that the creditors could have taken away from him.

Mr. Moss: Unless you will stipulate, I think I had better offer some evidence as to when the Trustee learned of the existence of the trust.

HARRY ASHTON

having been first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Moss: ~

Q. Your name is Harry Ashton, and you are the trustee [32] in this bankrupt estate, and petitioner in these two matters? A. That's right.

Q. When, Mr. Ashton, as nearly as you can state, did you first learn of the existence of this trust, a copy of the declaration of which has been offered in evidence, as petitioner's "1"?

A. About the time of the final meeting, or shortly before the final meeting of creditors you conveyed some information to me that you were interested in investigating Mr. Sentney's interest in some estate or trust, but with no specification as to what that was, or anything. Then about a week or ten days ago Mr. Goldman called me and said you were investigating this trust and at that time read to me Paragraph Eleven, and asked me my opinion on it.

Q. Do you recall the date of the final meeting?

A. No.

The Referee: The records show it was September 27, 1943.

Witness: It would not have been over five days either way from that date.

Q. In the neighborhood of September 20, 1943 or September 22nd?

A. It may have been before, or it may have been afterward; I am not certain.

The Referee: Mr. Moss is your attorney?

(Testimony of Harry Ashton.)

Witness: That's right.

The Referee: Of course that is just a chain then; he informed you and I suppose knowledge to him, as your attorney, [33] might be knowledge to you.

Mr. Moss: We set forth September 1, because as near as I could ascertain that was the date I learned of the matter. Mr. Lombardi, my associate, learned about it about September 1st.

The Referee: The record may receive that as evidence. That counsel—Do you want to cross-examine on that question of the first knowledge of the counsel, Mr. Turnbull?

Mr. Turnbull: I want to ask him about the time Mr. Goldman talked to him.

Cross-Examination

By Mr. Turnbull:

Q. You say Mr. Goldman called you?

A. Yes. It was a week or ten days, or some time after Mr. Moss made the statement to me.

Q. And you read page 19, or paragraph 11, of the trust?

A. I don't know that it was page 19 or paragraph eleven, but he stated to me he was reading to me the spendthrift paragraph of the trust.

Q. That was the paragraph in which it said no person other than the Huffs could alienate or anticipate or do anything with the property or the subject matter of the trust, or it could not be reached by any creditors?

A. Yes; it was quite a lengthy statement.

Q. And he told you it had not been included in the schedules because there was nothing there the bankrupt could convey, or nothing that would pass to the creditors? [34]

(Testimony of Harry Ashton.)

Mr. Moss: I object to that as entirely immaterial, what Mr. Goldman said; it is purely incompetent. If it should have been included in the schedules, it makes no difference what Mr. Goldman's opinion about it was, and it is absolutely incompetent to prove anything.

The Referee: Probably so; and it will fall by its own weight, but if Mr. Turnbull wants the full conversation between Mr. Ashton and Mr. Goldman I think he is entitled to it; you opened it up.

Mr. Moss: We opened it for one purpose only, and that was as to the date, and I have no objection to him asking on the date, but I do object to him getting into the record absolutely self-serving incompetent declarations—some sort of moral defense, I guess.

Mr. Turnbull: It is legal defense.

The Referee: Those things of that nature don't affect the record much, but if Mr. Turnbull wants the full conversation, whatever it was, whatever the opinion these gentlemen had about this situation, I think it will be permitted here, because it was opened up as to one part, and probably we should allow all of it.

Witness: I can give you that 'phone conversation. It was over the 'phone that Mr. Goldman first asked me what was going on in the Sentney matter, what was Moss and Lombardi up to, and I said, "I don't know, they stated there was some further investigation of some estate or trust or [35] something like that. I didn't know anything about it. Mr. Goldman made the statement that he knew I wouldn't harass or follow his client, but that Moss and Lombardi might, and he wanted me to know what this trust was, and that he felt there was absolutely no interest, and he then read me the part which I have heretofore stated.

(Testimony of Harry Ashton.)

By Mr. Turnbull:

Q. Purporting to be from the trust?

A. Yes, and asked me what my opinion was, and I told him I would not give an opinion on anyone reading me anything, I would want to examine the entire document, and not only that, I wouldn't express an opinion because my attorneys were already investigating it. I told him if there was something like that it should be brought out in court by an order to show cause against me by his client, or by an order to show cause by me, and he said, "We will take some such steps."

Q. Did Mr. Goldman call your attention to the fact that section 70 of the Bankruptcy Act provided that only property which would pass to the trustee in bankruptcy would be the property he could dispose of in any manner, or which his creditors could have taken over from him?

A. I don't believe he called my attention to it.

Q. Did you call his attention to it? A. No.

Q. You didn't discuss the law on it? [36]

A. No; not at all.

The Referee: Any redirect?

Mr. Moss: I don't think so. I would like to offer in evidence— suppose the Court takes judicial knowledge of all of its records in this matter, but I would like to offer, out of an abundance of caution, the schedules signed by this bankrupt and sworn to, in evidence.

The Referee: The schedules and statement of affairs will be considered in.

Mr. Moss: I think that is all.

Mr. Turnbull: On the order to show cause, with respect to the criminal intent, I think I will put on Mr. Goldman with respect to that.

MARTIN GOLDMAN

having been first duly sworn, on oath testified as follows:

Direct Examination

By Mr. Turnbull:

Q. Your name is Martin Goldman?

A. Yes sir.

Q. And you are an attorney at law?

A. I am.

Q. A member of the Bar of this court?

A. I am.

Q. And have been for more than ten years last past?

A. Yes sir.

Q. You were the attorney of record for Charles Ralph [37] Sentney, the bankrupt herein? A. I was.

Q. And were the person who prepared the schedules and petition? A. That is correct.

Q. At, or immediately prior to the filing of the schedules had you had before you this trust 245 of the First National Bank of Santa Ana, being the one which is now in evidence, executed by the devisors or grantors, W. A. and Edith Huff?

A. I had in my possession a copy of the trust, and some of the amendments to it, perhaps a year prior to that time, and I kept in my files a copy of portions of that trust, and I had before me at the time, I think, all of the original trust agreement.

Q. But not all of the amendments?

A. No; I didn't receive all of the amendments until after the death of Edith Huff.

Q. And you were familiar, generally, with the terms of that trust? A. I was.

(Testimony of Martin Goldman.)

Q. Immediately prior to the preparation of the schedules did you consider the terms of that trust with respect to whether or not there was any interest of property, expectancy or otherwise, which the bankrupt should schedule in his schedules?

A. I did; I made many— [38]

Q. Did you discuss that matter with the bankrupt?

A. I did.

Q. Did you give him an opinion with respect to it?

A. I gave him an opinion after maybe fifteen or twenty hours of briefing the subject.

Q. What was that opinion?

A. That he had no interest.

Q. And that it need not be scheduled?

A. And that it need not be scheduled.

Q. And in preparation of the schedules you did not include it? A. I did not.

Q. At that time did you have the facts with respect to this trust before you?

A. Most of them, with the exception of some later amendments that I later acquired.

Q. You have now examined the amendments, have you? A. I have.

Q. Would that change your opinion which you have on that?

A. It would not. My opinion is just the same now.

Q. In other words, if you had had all of these amendments before you, the advise you would have given your client would be the same?

A. It would be the same.

(Testimony of Martin Goldman.)

Q. At the time you gave your opinion to Mr. Sentney did you have any intent to conceal from the Trustee or the [39] creditors the existence of any property?

A. Of course not.

Q. Did you have any intent to cause your client to conceal any property from the court or trustee?

A. No, no.

Q. Did you have any intent to cause your client, the bankrupt, to make any false oath?

A. Absolutely not.

Cross Examination

By Mr. Moss:

Q. Did you reduce the brief you prepared, as a result of this twenty hours of work, to writing?

A. I did.

Q. Do you have it?

Mr. Turnbull: I have it.

A. I wrote it in longhand, as I remember, part of it, and part of it I dictated, and I had it all typewritten by my secretary.

Q. Prior to the filing of the petition?

A. That's right. Let me qualify that. I think since I had this meeting with you and Mr. Lombardi in your office I did some additional work, and I could not tell you right now which of these items were briefed before or after.

Mr. Turnbull: I also have added some authorities to it in my own handwriting, counsel.

Q. Can't you take a look at these documents now and [40] tell me which ones you had prepared at the time you filed your petition?

(Testimony of Martin Goldman.)

A. Probably. I believe I briefed the case of *McColgan v. McGee*, 172 Cal. 182.

Q. Without going to the extent of reading this document, will you please identify the documents you had prepared at the time you filed the petition?

A. Mr. Moss, I had numerous pages of notes in brief, and when this matter came up I had them all typed on these sheets of paper.

Q. Do you have them?

A. I don't know whether I have them in my file or whether my secretary gave them back to me or not, after she copied them.

Mr. Turnbull: Mr. Moss I have only handed you the portion of the brief the witness gave me. I have another brief but that is the only brief he gave me, as part of his file.

Mr. Moss: I have no desire to see your brief: all I want is to see the one the witness has testified he made.

Mr. Turnbull: The portion I handed you was in his own handwriting.

Mr. Moss: I started to say, facetiously, that by reason that the portion of the brief Mr. Turnbull handed to me which I can read, I can tell it would not be his or mine.

Witness: This is mine. It was prepared subsequently [41] for this matter.

Q. Would you say that these four yellow sheets constitute the brief that you prepared prior to the filing of the petition in bankruptcy?

A. The major portion of that would be.

Q. What else is there that you prepared, if anything, in addition to that?

(Testimony of Martin Goldman.)

A. This reference here (indicating) "Re statement on trusts" and the case of Coughran v. First National Bank of Baldwin Park, 19 Cal. App. (2) 152; the statement quoted from Remington on Bankruptcy; and all of the rest of them I had previous to that time. That is my recollection at this time.

Q. In other words, those that you have mentioned you found after you filed the petition? A. Yes sir.

Q. But with that exception all of the rest of them you had before you filed the petition?

A. Yes; they refer particularly to the matter of concealment of assets. I didn't brief the subject of concealment of assets—at the time the petition was filed I only briefed the question of what rights or properties passed, or what should be scheduled.

Mr. Moss: I offer next in evidence these yellow sheets.

Witness: You have omitted one.

Q. That is the one you state you prepared subsequently? [42] A. That is right.

Mr. Moss: I am not interested in that.

The Referee: I will clip them all together and mark them as "2".

[Trustee's Exhibit No. 2 will be found at the end of the testimony, p. 240.]

By Mr. Moss:

Q. After you made your investigation of the law did you have a discussion of the matter with the bankrupt, in which the results of your investigation were discussed?

A. Yes, of course.

(Testimony of Martin Goldman.)

Q. Did you tell him in that conversation that you had spent approximately twenty hours in briefing the law on the subject?

A. I don't recall whether I told him I had spent twenty hours or not. I think it was not until four or five days after we first discussed it that I did give him an opinion.

Q. What did you say to him in that conversation?

A. I don't think I said much, other than the fact I prepared the schedules from the statements he had given me of his assets and liabilities, and mentioned to him the fact that he had no interest in the trust and therefore it should not be included.

Q. Well, isn't it true that both yourself and the bankrupt were seeking a legal excuse to omit any reference to the trust from the schedules and statement of affairs?

A. No sir.

Q. There was no desire on your part to omit that? [43]

A. No sir.

Q. Did you tell the bankrupt that as a result of your investigation the point was absolutely clear?

A. Yes.

Q. And the question of seeking an excuse, an authority of any kind, to enable you to omit any reference to the trust from the schedules was never discussed between yourself and the bankrupt?

A. That is correct. There was no such discussion.

Q. In other words, you had no reason or desire to omit it, is that correct?

A. No sir. The only reason I prepared it was to know what was the proper thing to do.

(Testimony of Martin Goldman.)

Q. Then you had no reason or desire to omit any reference to the trust from the schedules?

A. Well, the thought never came to my mind. I was not seeking to either omit or put it in. I was seeking the fact of whether it should be put in or not.

Q. You had no reason or desire to omit any reference to the trust from the schedules? A. No.

Q. And you had no reason or desire, either yourself or the bankrupt, to conceal the existence of the trust from the Trustee or the creditors? A. No.

Q. Did you ever have any discussion with the bankrupt [44] wherein the advisability of setting forth all of the facts concerning the trust in the schedules was discussed? A. No sir.

Q. Did you have any discussion with the bankrupt concerning the meaning of Schedule B-4?

A. I think I explained that to the bankrupt. I didn't discuss it with him.

Q. What explanation did you give him?

A. I had my secretary place the amount there, I think \$100, which was the amount he gave me, in connection with his bankruptcy petition, and I told him that was properly filled out, or something to that effect, and I told him to sign it.

Q. And did you tell him that the interest in this trust constituted neither property in reversion, remainder or expectancy, or property held in trust, or property—

A. I don't know what words I used, but I told him he had no property which should be included in that paragraph.

Q. Did the bankrupt make any statement to you as to whether or not it would be advisable to set all of the

(Testimony of Martin Goldman.)

facts forth in the schedules and let the court determine whether or not there was any title or anything that passed to the Trustee? A. We had no such discussion.

Q. The matter of whether or not you should make any reference to the trust anywhere, in either the bankrupt's schedules, his statement of affairs, or his testimony in [45] court was never discussed between yourself and the bankrupt? A. That is not true.

Q. Where was it discussed?

A. Of course it was. I have already testified it was discussed.

Q. Well, please enlighten me. To what testimony do you refer now?

A. I don't remember your questions or the answers I gave to them. If I had the questions I could repeat the answers.

Q. You are referring to the oral part of your testimony where you said you told him it need not be included?

A. That is correct. Let me put it this way: That several times, maybe one or two, before the schedules were filed we discussed generally his assets and liabilities. In that discussion we discussed the possibility that he might have an interest in this trust. I got out a copy of the trust and I told him I could not tell him at once whether that was an asset or not, and five or six days or maybe a week later, I told him it was not. That was the discussion.

Q. Well, when the bankrupt first discussed the filing of this petition in bankruptcy, what reasons did he give you for a desire to file a petition?

(Testimony of Martin Goldman.)

A. He had been in the real estate business and the construction business, and because of the war that business [46] had ceased, you couldn't get any more materials. He had been out of that business at that time for practically a year and a half and he was simply eating up his accumulated earnings, trying to keep his office open. Furthermore he had been inducted, not inducted, but he was taking his medical examination, and he had an obligation to his brother-in-law coming due of many thousands of dollars and if he went into the army he wanted to feel free and easy about his obligations, and I suggested that under the circumstances he had a right to file bankruptcy.

Q. Did he say anything to you about the fact that his aunt was getting quite old and her health was not any too good, and he had better get this thing cleared up before she died, so the creditors wouldn't grab it?

Mr. Turnbull: I object to that on the grounds of the Swift case, which holds that motive is no object. (Here follows a long discussion by Mr. Turnbull of that case) It is immaterial. That is my objection.

Mr. Moss: No one has ever contended anyone need give any motive or reason for filing a petition in bankruptcy; a solvent person may do it.

The Referee: The objection is overruled. Mr. Moss has indicated he wants to place some weight on the lack of the scheduling of this interest, whatever it was, and since the question of intent has arisen, we might as well let the record be complete. [47]

Mr. Turnbull: All right.

By Mr. Moss:

(Testimony of Martin Goldman.)

Q. You want to testify that nothing like what I have mentioned—

Mr. Turnbull: The objection is overruled; let's get the answer.

Witness: What was the question?

(Thereupon the last question was read by the Reporter: "Q. Did he say anything to you about the fact that his aunt was getting quite old and her health was not any too good, and he had better get this thing cleared up before she died, so the creditors wouldn't grab it?")

A. The answer is no.

Q. And the age or condition of health of the aunt was not discussed at all?

A. I don't recall any discussion about that.

Q. And the effect of her death, permitting creditors to acquire what he received or might receive from her, that was never discussed at all?

A. It was discussed, but not at that time.

Q. When was it discussed?

A. After the first meeting of creditors in this court the bankrupt was handed a document advising him to report to the court any properties which he acquired within six months. I explained that document to him and told him if his aunt died within six months from his adjudication he [48] would have to report that fact.

Q. Had you explained that provision of the law to him previously? A. I had not.

Q. In all of your discussions with the bankrupt up to that time, the question of this trust and the existence of this trust, that was never discussed with the bankrupt?

A. It was. I have testified several times that we discussed it.

Testimony of Martin Goldman.)

Q. Well, at this one time you mentioned; at the time you received the form from the court?

A. No. I testified I discussed it with him previous to that time.

Q. You discussed the existence of the trust?

A. And whether or not it should be scheduled.

Q. Yes, but the fact that his aunt was getting old and was in poor health and that she might pass away, and he had better get this cleaned up pretty soon, that was never discussed?

A. No sir, it was not.

Q. You had met the aunt yourself?

A. I had.

Q. You knew she was of advanced age and in poor health?

A. She had been in poor health for many years. She might as well have lived another ten years; she had been in poor health many years. [49]

Q. But you knew these two facts? A. I did.

Q. And you had no discussion with the bankrupt up until the time the Court handed you a copy of the form of the order concerning the reporting of any inheritance within six months; up to that time you had no discussion with the bankrupt concerning the effect of his aunt's death, is that correct? A. That is correct.

Q. And you never made the suggestion to the bankrupt, and you never had any conversation with him to the effect that in view of the fact that his interest in the trust would be of considerable value, and that the extent of the law was such that it required some twenty hours of investigation on your part to arrive at an opinion, that it might be advisable and preferable to set forth in the

(Testimony of Martin Goldman.)

schedules all of the facts concerning the trust and permit the court to pass on the question, and permitting the creditors to have knowledge of the matter?

Mr. Turnbull: Object to that as argumentative, a multiple question, and assuming facts the witness has not testified to.

The Referee: I was trying to follow it and see what the answer in the final analysis would be; what would be "yes" and what would be "no". You are over my depth.

Witness: I think there are twelve answers to the question [50] I can think of.

Mr. Moss: I will reframe my question.

Q. Did you ever say to the bankrupt something like this: Mr. Sentney, this question is not a dead open and shut question. I have spent about twenty hours looking up this law. I am satisfied it does not pass, but someone else might not agree with us, and I think the wise thing for us to do would be to put it in the schedules—Did you have any such conversation with him?

A. No sir. I knew what to do, and what I did was right, and I so advised him.

Q. Did he ask you whether or not it might be better to let everyone know about this and not conceal it?

A. No sir; now no question of concealment ever arose.

Q. He never asked you whether or not it might be better to tell everyone about this trust and not conceal it?

A. No sir.

Mr. Moss: That is our case.

Mr. Turnbull: May I have time to check with the witness, who is also counsel?

The Referee: Yes sir.

(Testimony of Martin Goldman.)

Mr. Turnbull: The respondent rests in each matter.

The Referee: Any further evidence?

Mr. Moss: No more evidence.

Mr. Turnbull: May I suggest this: This is a matter of importance and knowing the tenacity of opposing counsel, I [51] have briefed it pretty well myself and am satisfied with our right, and I would like to give Your Honor the benefit of the exhaustive search I have made. I have read every case in California and most of the ones in the Federal courts on the question of whether this constitutes an interest, or whether it doesn't. The question of if it does not pass there could not be a concealment, and I would like to give you the benefit of what I have done.

The Referee: Is that agreeable to you Mr. Moss?

Mr. Moss: Yes sir, with this explanation and indulgence on the part of court and counsel: I have no law with me on this; I have been working in the law library, and I have to secure the aid of Mr. Lombardi on reading over pertinent office files in preparation of my brief, but I think I can do that in twenty days, maybe less.

Mr. Bradley: I thought I had a case that determined the entire matter.

Mr. Turnbull: I have several.

Mr. Bradley: I thought I had one very recent case from the California court.

Mr. Moss: I don't construe that as Mr. Bradley does. I construe it to support our position.

The Referee: If I have followed Mr. Moss closely enough, he has indicated that regardless of whether or not there was distinctly on the date of bankruptcy an

(Testimony of Martin Goldman.)

asset here, it was still an obligation and duty on behalf of the bankrupt to [52] reveal the expectancy interest in the trust in the schedules and that failure to reveal the same is not a complete discharge—

Mr. Moss: That is correct in one respect, and may I add this further suggestion: Our position is this: We know that it is the custom of many beneficiaries under such trusts to assign their interest, effective as to the date of distribution of the corpus. Of course the trust prohibits alienation during its existence. That would be the law even if it was not in the trust. But we know it is frequently done; that they assign it, effective as of the date of distribution, therefore he could by that means have transferred an interest, to become effective at the date of the distribution.

Mr. Turnbull: I will meet that very issue. We say the law is that no concealment of property can be committed unless the assets charged to be concealed are such that the trustee could have acquired. In other words, if Your Honor had known all of the facts you know now, and the Trustee had known them and Mr. Moss had known them, he still would have had no property in this estate; there was none to pass.

Mr. Moss: We would have had the Court make an order on the bankrupt to transfer any interest in that trust which he might have.

The Referee: There is quite a point in dispute. [53]

Mr. Bradley: May I state the position of the bank?

The Referee: One moment. Where is Exhibit "1"?

(Instrument is handed to the Referee by Mr. Mortenson.)

The Referee: To this I will attach this amendment.

(Testimony of Martin Goldman.)

Mr. Turnbull: No, it is there.

Mr. Turnbull: It will be now stipulated that instead of the trust officer furnishing an additional exhibit, to-wit the amendment of July 3, 1928, it is stipulated that in the Exhibit "A" it is now included, although it is out of place, and the record is now complete?

Mr. Bradley: So stipulated.

Mr. Moss: Yes sir.

Mr. Bradley: The briefs are to be submitted in what order?

The Referee: It seems to me it would save time, Mr. Turnbull, for you to file your brief whenever you can and—

Mr. Bradley: And the brief of the bank?

The Referee: I don't want to require any work at all on behalf of the bank.

Mr. Bradley: Might I submit one authority?

The Referee: Yes, do you have it there?

Mr. Bradley: Yes sir. *Kelly v. Kelly*, 11 Cal. (2) 356. Under that we contend it was the duty of the bank to put the money in the hands of the beneficiaries named.

Mr. Moss: I don't question the fact of the assignment for delivery during the trust, but the assignment [54] was taken in that very case. The plaintiff recovered in that very case.

The Referee: I will keep an open mind on this. I am interested in seeing your authorities and facts. I will mark this submitted, and Mr. Turnbull may file his first brief and Mr. Moss may get his in as soon as possible.

Mr. Moss: There is one thing I overlooked. I would like to offer in evidence, and have filed, a transcript of

(Testimony of Martin Goldman.)

the testimony of the bankrupt, given at the first meeting of creditors, and the stipulation of counsel that that is the only testimony he has given in this proceeding.

Mr. Turnbull: I don't know what counsel is talking about; I have never seen it.

The Referee: Of course, anything the bankrupt has said at any time, under oath, may be received, I think, subject to cross-examination. You are going to have a transcript written up?

Mr. Moss: I think it should be, and filed here.

The Referee: Obviously Mr. Turnbull, in order to determine whether he has concluded his matter, should have the right of inspection.

Mr. Moss: If you want to reopen after you have inspected it I will have no objection.

The Referee: That will be the condition under which it will be received. I suggest you send it to Mr. [55] Turnbull before it comes into my hands.

Mr. Turnbull: I don't imagine I will want a copy.

(Court adjourned.) [56]

State of California

County of Los Angeles—ss.

I, Kate W. Leiden, official reporter for the above entitled court, do hereby certify:

That pages 1 to 56, inclusive, constitute a full, true and correct transcript of a hearing held in the above matter on October 13, 1943, including all of the testimony given, all objections and rulings thereon, together with all statements of Court and Counsel, and all matters pertaining to the above hearing.

Reporter.

[Endorsed]: Filed May 26, 1944.

[TRUSTEE'S EXHIBIT NO. 1]
DECLARATION OF TRUST.

Trust No. 245.

(W. A. Huff)

Know All Men By These Presents:

That Whereas, by assignments, conveyances and other methods of transfer there has been concurrently herewith assigned, conveyed and transferred to The First National Bank of Santa Ana, a national banking corporation, having its principal place of business in the City of Santa Ana, County of Orange, State of California, hereinafter referred to as the Trustee, certain real and personal property, the description of which is set out in Exhibit "A" hereto attached and made a part hereof; and

Whereas, no consideration was paid by the Trustee for any of said assignments, conveyances or transfers, nor will the Trustee in the future pay for any assignments, conveyances or transfers contemplated hereunder, said assignments, conveyances and transfers now made and in the future to be made by W. A. Huff and Edith Huff, his wife, hereinafter referred to as the Trustors;

Now, Therefore, this Declaration of Trust witnesses, certifies and declares that said Trustee holds and continues to hold all the said real and personal property set forth and described in Exhibit "A" hereunto attached, and the other property that may be hereafter assigned, conveyed and transferred to it as herein contemplated, upon the conditions of trust as set forth herein, to-wit:

1.

That the Trustee will hold and continue to hold any and all of said property, both real and personal, excepting that

(Trustee's Exhibit No. 1.)

which has been disposed of by the Trustors in accordance with paragraph twelve hereof, but will not take over the actual management of same until the death of W. A. Huff, one of the Trustors herein, excepting as provided in paragraph eight hereof. [14]

Until such time as the Trustee takes over the actual management of the trust estate, the only duty of said Trustee is to hold the legal title of same; it being a distinct provision of this trust that the Trustee shall not make collections or be responsible for the collection of any of the income of the trust estate held in trust by it until such time as it takes over the *the* actual management of same.

2.

That following the death of W. A. Huff, one of the Trustors herein named, provided there remain in the hands of the Trustee sufficient amounts of the trust estate to permit it so to do, there shall first be paid by the Trustee the funeral expenses, expenses of last illness and just debts of the Trustor, W. A. Huff; and there shall then be distributed to Edith Huff, the other Trustor herein named, all the household furniture and fixtures, and automobiles, together with the personal effects of the said Trustor, W. A. Huff, (provided an assignment of same has been made to the Trustee and still remains in its hands).

From the remainder of the trust estate there shall then be distributed by the said Trustee certain amounts as follows:

First: To S. E. Huff, brother of the said Trustor, W. A. Huff, the sum of Ten Thousand Dollars (\$10,000.).

(Trustee's Exhibit No. 1.)

Should said S. E. Huff not be living, then said Ten Thousand Dollars (\$10,000.) shall become a part of the residue of the trust estate and distributed as hereinafter provided.

Second: To Addie Mahen, daughter of S. E. Huff, brother of said Trustor, W. A. Huff, the sum of Five Thousand Dollars (\$5000.). Should said Addie Mahen not be surviving, but be survived by bodily issue, then said Five Thousand Dollars (\$5000.) shall be paid to her bodily issue per stirpes. Should said Addie Mahen not be surviving and not be survived by bodily issue, then said Five Thousand Dollars (\$5000.) shall become a part of the [15] residue of the trust estate and distributed as hereinafter provided.

Third: To Helen Parke, daughter of C. S. Huff, deceased brother of said Trustor, W. A. Huff, the sum of Five Thousand Dollars (\$5000.). Should said Helen Parke not be surviving but be survived by bodily issue, then said Five Thousand Dollars (\$5000.) shall be paid to her bodily issue per stirpes. Should said Helen Parke not be surviving and not be survived by bodily issue, then said Five Thousand Dollars (\$5000.) shall be paid to her sister, Ethel Huff, and should said Ethel Huff not be living, then to the bodily issue of said Ethel Huff per stirpes. Should said Helen Parke not be surviving and not be survived by bodily issue or by said Ethel Huff, or by bodily issue of said Ethel Huff, then said Five Thousand Dollars (\$5000.) shall become a part of the residue of the trust estate and distributed as hereinafter provided.

Fourth: To Ethel Huff, daughter of C. S. Huff, deceased brother of said Trustor, W. A. Huff, the sum of

(Trustee's Exhibit No. 1.)

Five Thousand Dollars (\$5000.). Should said Ethel Huff not be surviving but be survived by bodily issue, then said Five Thousand Dollars (\$5000.) shall be paid to her bodily issue per stirpes. Should said Ethel Huff not be surviving and not be survived by bodily issue, then said Five Thousand Dollars (\$5000.) shall be paid to her sister, Helen Parke; should said Helen Parke not be living, then to the bodily issue of said Helen Parke per stirpes. Should said Ethel Huff not be surviving and not be survived by bodily issue or by said Helen Parke or by bodily issue of said Helen Parke, then said Five Thousand Dollars (\$5000.) shall become a part of the residue of the trust estate and distributed as hereinafter provided.

Fifth: To Lulu Huff, widow of C. S. Huff, deceased brother of said Trustor, W. A. Huff, the sum of Ten Thousand [16] Dollars (\$10,000.). Should said Lulu Huff not be surviving, then said Ten Thousand Dollars (\$10,000.) shall become a part of the residue of the trust estate and distributed as hereinafter provided.

Sixth: To the First Methodist-Episcopal Church of Santa Ana, California, the sum of Five Thousand Dollars (\$5000.)

The balance of the trust property shall then be handled and disposed of as hereinafter provided.

3.

That part of the trust estate consisting of real property located in the City of Santa Ana and used as a home by the Trustors and real property located at Balboa, California, and used as a home by the Trustors at the time of the death of said W. A. Huff, should he be survived by

(Trustee's Exhibit No. 1.)

his wife, Edith Huff, shall be held in trust by the said Trustee as long as the said Edith Huff wishes to retain said properties; said Edith Huff to pay the taxes, assessments and upkeep of said properties while she wishes them held in trust from the income which she receives as provided in this Declaration of Trust to be paid to her.

At such time as she wishes either of said properties to be sold, the Trustee shall sell same at such a price as is acceptable to said Edith Huff, and the proceeds thereof shall become a part of the trust estate held in trust according to the provisions of paragraph three hereof. Or should the said Edith Huff desire that the proceeds of either or both of said homes, when sold, be reinvested in another home or homes of her choosing, the Trustee may and is hereby authorized to invest said proceeds from the home or homes so sold in another home or other homes such as said Edith Huff may choose. Following her death, should either or both of said homes still remain in trust, said homes shall be sold and the proceeds thereof shall become a part of the trust estates as held in trust and distributed as hereinafter [17] provided for the distribution of the trust estate following the death of said Edith Huff.

The trust estate then remaining in the hands of the Trustee after the payment of the funeral expenses and expenses of last illness and legal debts of the Trustor, W. A. Huff, together with the payment of the sums provided to be paid in subdivisions first to sixth, both inclusive, of paragraph two, shall be divided into two equal parts and each part shall remain in the hands of the Trustee as long as Edith Huff, one of the Trustors herein

(Trustee's Exhibit No. 1.)

named, shall live; and the Trustee shall enter into possession of both parts of the trust estate, manage and control the same and shall have and execute full power and authority;

First: To sell and convey any of the real property so held in trust, and to hold or invest, or reinvest the same, or apply, or dispose of the proceeds in accordance with the terms of this Declaration of Trust.

Second: To mortgage or lease any of the real property belonging to said trust estate for the benefit of any annuitants, or other Beneficiaries named in this Declaration of Trust, or for the purpose of satisfying any charge upon any of the real property belonging to said trust estate.

Third: To receive the rents and profits of any of the real property belonging to said trust estate, and to pay them or apply them to the use of any of the persons as is herein provided, whether ascertained at the time of the creation of this trust or not and in accordance with the terms of this Declaration of Trust.

Fourth: To receive the rents and profits of any real property belonging to said trust estate and to accumulate the same for the purposes as provided in this Declaration of Trust.

Fifth: To convey, partition, divide, distribute, or allot any of the real property belonging to said trust estate in [18] accordance with the terms of this Declaration of Trust.

All of the foregoing purposes are subject to the limitations thereon as imposed by the laws of the State of California.

(Trustee's Exhibit No. 1.)

In addition to the foregoing powers and authorities, the Trustee shall have full power and authority so far as the same relates to any personal property belonging to said trust estate to sell, convey, transfer, incumber, invest, re-invest, collect and in every way contract with, handle, and control in accordance with its best discretion and in accordance with the laws of the State of California.

With the following exception, that should any of the real property of said trust estate be sold by the Trustee, the same shall be sold at its fair market value and according to a price agreed upon by three disinterested individuals versed in land values, said three disinterested individuals to be appointed by said Trustee.

A—The net income available for distribution from one part of the trust estate shall be paid to Edith Huff, one of the Trustors herein named, as long as she shall live; with a provision that should the net income from that part of the trust estate to be paid to said Edith Huff not be sufficient for her maintenance, support and comfort, the Trustee may and is hereby authorized to use sufficient amount of the net income available for distribution from the other part of the trust estate as the Trustee deems necessary and advisable for the maintenance, support and comfort of said Edith Huff; and should the income of both parts of the trust estate not be sufficient for the maintenance, support and comfort of the said Edith Huff, the Trustee may and is hereby authorized to distribute sufficient amount of the principal of that part of the trust estate held in trust for her benefit as she may demand in addition to the net income hereinbefore provided to be paid to her. [19]

(Trustee's Exhibit No. 1.)

B—The net income available for distribution from the other part of the trust estate, after deducting the amounts, if any, as hereinbefore provided to be paid to Edith Huff, shall be distributed in the following manner:

One-third thereof to S. E. Huff, brother of the Trustor, W. A. Huff, until the death of said Edith Huff, the other Trustor herein named. Should the said S. E. Huff not be surviving or die before the death of said Edith Huff, then from said one-third there shall be paid, provided said income will permit, the sum of One Hundred Dollars (\$100) a month to the wife of S. E. Huff, provided she is then living. And any income in excess of One Hundred Dollars (\$100) a month shall be distributed to the said Edith Huff, the other Trustor herein named as long as she shall live.

One-third thereof to Helen Parke, daughter of C. S. Huff, deceased brother of W. A. Huff, one of the Trustors herein, until the death of said Edith Huff, the other Trustor herein. Should said Helen Parke not be surviving or die before the death of said Edith Huff, then that part of the income that would have been distributed to her shall be distributed in the following manner: The Trustee shall divide said income among the bodily issue of said Helen Parke per stirpes, provided they have attained the age of eighteen years. Should any of said bodily issue of said Helen Parke not have attained the age of eighteen years, then that part of the income that would have been distributed to them, should they have attained the age of eighteen years, shall be used by said Trustee towards the maintenance and education of said bodily issue not having attained the age of eighteen years; and the re-

(Trustee's Exhibit No. 1.)

mainder thereof, if any, shall be deposited in a savings account for the benefit of said bodily issue who shall not have attained the age of eighteen years, and the income accumulated thereon and distributed to said bodily issue at such time [20] as said bodily issue attain the age of eighteen years respectively; but notwithstanding anything to the contrary herein, same shall terminate on the death of said Edith Huff.

Should there be no bodily issue of said Helen Parke surviving, then the part of the income that would have been distributed to them shall be distributed to her sister, Ethel Huff; should said Ethel Huff not be surviving but be survived by bodily issue, then the Trustee shall divide said income among the bodily issue of said Ethel Huff per stirpes, provided they have attained the age of eighteen years. Should any of said bodily issue of said Ethel Huff not have attained the age of eighteen years, then from that part of the income that would have been distributed to them, should they have attained the age of eighteen years, shall be used by said Trustee towards the maintenance and education of said bodily issue not having attained the age of eighteen years; and the remainder thereof, if any, shall be deposited in a savings account for the benefit of said bodily issue, who shall not have attained the age of eighteen years, and the income accumulated thereon and distributed to said bodily issue at such time as said bodily issue attain the age of eighteen years respectively; but notwithstanding anything to the contrary herein, same shall terminate on the death of said Edith Huff.

Should said Helen Parke not be surviving and not be surveved by bodily issue, or by said Ethel Huff, or by

(Trustee's Exhibit No. 1.)

bodily issue of said Ethel Huff, then said part of the income shall be distributed to said Edith Huff as long as she shall live.

One-third thereof to Ethel Huff, daughter of C. S. Huff, deceased brother of W. A. Huff, one of the Trustors herein, until the death of said Edith Huff, the other Trustor herein. Should said Ethel Huff not be surviving or die before the death of said Edith Huff, then that part of the income that would have been distributed to her shall be distributed in the following manner: [21] The Trustee shall divide said income among the bodily issue of said Ethel Huff per stirpes, provided they have attained the age of eighteen years. Should any of said bodily issue of said Ethel Huff not have attained the age of eighteen years, then from that part of the income that would have been distributed to them, should they have attained the age of eighteen years, shall be used by said Trustee towards the maintenance and education of said bodily issue not having attained the age of eighteen years; and the remainder thereof, if any, shall be deposited in a savings account for the benefit of said bodily issue not yet eighteen years of age, and the income accumulated thereon and distributed to said bodily issue at such time as said bodily issue attain the age of eighteen years respectively; but notwithstanding anything to the contrary herein, same shall terminate on the death of said Edith Huff.

Should there be no bodily issue of said Ethel Huff surviving, then the part of the income that would have been distributed to them shall be distributed to her sister, Helen Parke; or in the event of her death as provided for, for distribution of her income.

(Trustee's Exhibit No. 1.)

Should said Ethel Huff not be surviving and not be survived by bodily issue, or by said Helen Parke, or by bodily issue of said Helen Parke, then said part of the income shall be distributed to said Edith Huff as long as she shall live.

4.

Following the death of said Edith Huff, one of the Trustors herein named, from that part of the trust estate referred to as "A" under paragraph three then remaining in the hands of the Trustee the Trustee shall pay her funeral expenses and expenses of last illness and legal debts, and thereafter there shall first be paid the sum of Five Thousand Dollars (\$5000.) to the Christian Church of Santa Ana, California. The remainder of the trust [22] estate held under "A" of paragraph three shall remain in the hands of the Trustee as long as Ella Whitted, sister of said Edith Huff, shall live, and as long thereafter until Jane Whitted, greatniece of said Edith Huff, has attained the age of twenty-one years. Should said Ella Whitted not live until said Jane Whitted has attained the age of twenty-one years, then said trust estate shall remain in the hands of the Trustee until said Jane Whitted has attained the age of twenty-one years, or should the said Ella Whitted die and the said Jane Whitted not live to attain the age of twenty-one years then the trust estate shall be held in trust until such time as the said Jane Whitted would have attained the age of twenty-one years should she have lived, provided that any of the herein specifically named Beneficiaries, who shall be alive at the creation of this trust, be living.

The net income of the trust estate held under "A" of paragraph three shall be distributed as follows:

(Trustee's Exhibit No. 1.)

First: To said Ella Whitted the sum of One Hundred Fifty Dollars (\$150) monthly during her life.

Second: To Jack Whitted, Margaret Whitted, Milo Mitchell, Gladys Mitchell, and Eileen Beaty, greatnephews and greatnieces of the said Trustor, Edith Huff, the sum of Fifty Dollars (\$50.00) a month each, until the termination of this trust.

Third: The sum of Fifty Dollars (\$50.00) a month of said income shall be distributed and accumulated by the Trustee in the following manner: Ten Dollars (\$10.00) thereof shall be used by the said Trustee towards the maintenance and education of Donald Whitted, son of Rex Whitted, nephew of the Trustor, Edith Huff, until he attains the age of eight years. Fifteen Dollars (\$15.00) a month shall be used by the said Trustee towards the maintenance and education of said Donald Whitted from the time he attains the age of eight years until he attains the age of twelve years. Twenty-five Dollars (\$25.00) a month shall be used [23] by the said Trustee towards the maintenance and education of said Donald Whitted from the time *he* attains the age of twelve years until he attains the age of sixteen years. Fifty Dollars (\$50.00) a month shall be used by the said Trustee towards the maintenance and education of said Donald Whitted from the time he attains the age of sixteen years until he attains the age of twenty-one years, provided he attends a high school, college or university; if he does not attend a high school, college or university, said Fifty Dollars (\$50.00) a month shall be deposited in a savings account and the interest accumulated and paid to him when he attains the age of twenty-one years.

(Trustee's Exhibit No. 1.)

The balance of the Fifty Dollars (\$50.00) a month as hereinbefore provided shall be deposited in a savings account and the income accumulated until said Donald Whitted attains the age of sixteen years when the sums so accumulated in a savings account, including the earnings thereon, shall be used towards the maintenance and education of said Donald Whitted, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sums are to be accumulated and paid to him when he attains the age of **twenty-one years.**

Should said Donald Whitted not live to attain the age of twenty-one years but be survived by bodily issue, then the said amounts as hereinbefore provided to be paid to him or accumulated for him shall be distributed to his bodily issue per stirpes. Should he not live to attain the age of twenty-one years and not be survived by bodily issue, then the amounts hereinbefore provided to be paid to him or accumulated for him shall become a part of the net income of that part of the trust estate referred to as "A" of paragraph three and shall be distributed as hereinafter provided under subdivision sixth of this paragraph four.

Fourth: The sum of Fifty Dollars (\$50.00) a month of [24] the net income shall be distributed and accumulated by the said Trustee in the following manner: Twenty-five Dollars (\$25.00) a month thereof shall be used by the said Trustee towards the maintenance and education of Jane Whitted, greatniece of said Trustor, Edith Huff, until said Jane Whitted has attained the age of sixteen years; Fifty Dollars (\$50.00) a month shall be used

(Trustee's Exhibit No. 1.)

by the Trustee towards the maintenance and education of said Jane Whitted from the time she attains the age of sixteen years until she attains the age of twenty-one years, provided she attends a high school, college or university; if she does not attend a high school, college or university, said Fifty Dollars (\$50.00) a month shall be deposited in a savings account and the interest accumulated and paid to her when she has attained the age of twenty-one years. The balance of the Fifty Dollars (\$50.00) a month as hereinbefore provided shall be deposited in a savings account for her benefit and the income accumulated until the said Jane Whitted attains the age of sixteen years when the sums so accumulated in a savings account, including the earnings thereon, shall be used towards the maintenance and education of said Jane Whitted, provided she attends a high school, college or university; if she does not attend a high school, college or university, said sums are to be accumulated and paid to her when she attains the age of twenty-one years.

Should said Jane Whitted not live to attain the age of twenty-one years but be survived by bodily issue, then the said amounts as hereinbefore provided to be paid to her or accumulated for her shall be distributed to her bodily issue per stirpes. Should she not live to attain the age of twenty-one years and not be survived by bodily issue, then the amounts hereinbefore provided to be paid to her or accumulated for her shall become a part of the net income of that part of the trust estate referred to as "A" of paragraph three and shall be distributed as herein- [25] after provided under subdivision sixth of this paragraph four.

(Trustee's Exhibit No. 1.)

Fifth: The sum of Fifty Dollars (\$50.00) a month for the net income shall be distributed and accumulated by the said Trustee in the following manner: Twenty-five Dollars (\$25.00) a month thereof shall be used by the said Trustee towards the maintenance and education of Billy Whitted, greatnephew of the said Trustor, Edith Huff, until said Billy Whitted has attained the age of sixteen years; Fifty Dollars (\$50.00) a month shall be used by the Trustee towards the maintenance and education of said Billy Whitted from the time he attains the age of sixteen years until he attains the age of twenty-one years, provided he attends a high school, college or university, if he does not attend a high school, college or university, said Fifty Dollars (\$50.00) a month shall be deposited in a savings account and the interest accumulated and paid to him when he has attained the age of twenty-one years. The balance of the Fifty Dollars (\$50.00) a month as hereinbefore provided shall be deposited in a savings account for his benefit and the income accumulated until the said Billy Whitted attains the age of sixteen years when the sums so accumulated in a savings account, including the earnings thereon, shall be used towards the maintenance and education of said Billy Whitted, provided he attends a high school, college or university; if he does not attend a high school, college or university, said sums are to be accumulated and paid to him when he attains the age of twenty-one years.

Should said Billy Whitted not live to attain the age of twenty-one years but be survived by bodily issue, then the said amounts as hereinbefore provided to be paid to him or accumulated for him shall be distributed to his

(Trustee's Exhibit No. 1.)

bodily issue per stirpes. Should he not live to attain the age of twenty-one years and not be survived by bodily issue, then the amounts hereinbefore provided to be paid to him or accumulated for him shall become a [26] part of the net income of that part of the trust estate referred to as "A" of paragraph three and shall be distributed as hereinafter provided under subdivision sixth of this paragraph four.

Sixth: The remainder of the net income of that part of the trust estate referred to as "A" of paragraph three shall be distributed by the said Trustee equally to the following nieces and nephews of the said Trustor, Edith Huff: Rex Whitted, Roscoe Whitted, Louie Beaty, Bernice Lutz, Ralph Sentney, and Mrs. Stella Mitchell; or in the event of the death of any of them, his or her share shall go to his or her bodily issue per stirpes, and if no bodily issue to the other Beneficiaries named in this subdivision sixth or to their bodily issue per stirpes.

Following the death of the said Ella Whitted, sister of the Trustor, Edith Huff, and thereafter at the times hereinbefore set forth for the termination of said portion of this trust, the trust estate then remaining in the hands of the Trustee shall be distributed by the said Trustee two-thirds thereof equally to the following nieces and nephews of the said Trustor, Edith Huff: Rex Whitted, Roxcoe Whitted, Louie Beaty, Bernice Lutz, Ralph Sentney, and Mrs. Stella Mitchell; and one-third thereof equally to the following great-nieces and great-nephews of the said Trustor, Edith Huff: Jack Whitted, Margaret Whitted, Milo Mitchell, Gladys Mitchell, Eileen Beaty, Billy Whitted, Jane Whitted, and Donald Whitted. Pro-

(Trustee's Exhibit No. 1.)

vided, however, that that part to be distributed to said Donald Whitted shall not be distributed to him unless he has attained the age of twenty-five years. If he has not attained the age of twenty-five years, same shall be held in trust and the income distributed to him monthly until he has attained the age of twenty-five years when the principal held for him shall be distributed to him.

Should any of the hereinbefore named Beneficiaries, who are to receive income or principal from that part of the trust [27] estate referred to as "A" under paragraph three, not be living, or die during the life of this trust and be survived by bodily issue, then said income or principal shall be paid to said bodily issue per stirpes. Should any of said Beneficiaries not be living or die during the life of this trust and not be survived by bodily issue, then the income or principal that would have been distributed to them shall be distributed as provided for the distribution of income in subdivision sixth of this paragraph four.

5.

That part of the trust estate referred to as "B" under paragraph three, following the death of said Edith Huff, one of the Trustors herein, shall be distributed as soon as can conveniently be done so as to preserve the trust estate:

First: One-third thereof to S. E. Huff, brother of the Trustor, W. A. Huff, provided he is surviving. If he is not surviving but is survived by a wife, then said one-third shall be held in trust and from the net income thereof there shall be paid the sum of One Hundred Dollars (\$100) a month to his wife, provided she is then living; and the remainder of the net income available for

(Trustee's Exhibit No. 1.)

distribution from said one-third shall be distributed, share and share alike, to said Helen Parke and Ethel Huff, daughters of said C. S. Huff, deceased brother of the Trustor, W. A. Huff, as long as the said wife of said S. E. Huff shall live. Following the death of said wife of said S. E. Huff, said one-third shall be distributed equally to said Helen Parke and Ethel Huff.

Should said S. E. Huff not be surviving and not be survived by a wife, the said one-third to be distributed to him shall be distributed to said Helen Parke and Ethel Huff, daughters of C. S. Huff, deceased brother of said Trustor, W. A. Huff, share and share alike. If either said Helen Parke or Ethel Huff should [28] not then be living, then the share that would have been distributed to her, had she been living, shall be distributed to her bodily issue per stirpes; if no bodily issue of said Helen Parke or Ethel Huff so dying should be surviving, then said share shall go to the survivor of said Helen Parke or Ethel Huff. Should neither said Helen Parke or Ethel Huff be surviving and no bodily issue of theirs surviving, then said part of the trust estate that would have been distributed to them shall be distributed to the heirs of Edith Huff, one of the Trustors herein, according to the then existing statutes of succession of the State of California.

Second: One-third thereof to Helen Parke, niece of the said Trustor, W. A. Huff, provided she is surviving, If she is not surviving, but is survived by bodily issue, then said one-third shall be distributed to her bodily issue per stirpes, or to their legal guardian if they have not attained the age of majority. Should she not be surviving and

(Trustee's Exhibit No. 1.)

not be survived by bodily issue, then said one-third shall be distributed to her sister, Ethel Huff; and if said Ethel Huff is not surviving, but there be surviving bodily issue of said Ethel Huff, then said one-third shall be distributed to the bodily issue of said Ethel Huff or to their legal guardian if they have not attained the age of majority; and if there be no bodily issue of said Ethel Huff surviving, then said one-third shall be distributed to the heirs of said Edith Huff according to the then existing laws of succession of the State of California.

Third: One-third thereof to Ethel Huff, niece of the said Trustor, W. A. Huff, provided she is surviving. If she is not surviving, but is survived by bodily issue, then said one-third shall be distributed to her bodily issue per stirpes, or to their legal guardian if they have not attained the age of majority. Should she not be surviving and not be survived by bodily issue, then said one-third shall be distributed to her sister, [29] Helen Parke; and if said Helen Parke is not surviving, but there be surviving bodily issue of said Helen Parke, then said one-third shall be distributed to the bodily issue of said Helen Parke or to their legal guardian if they have not attained the age of majority. And if there be no bodily issue of said Helen Parke surviving, then said one-third shall be distributed to the heirs of said Edith Huff according to the then existing laws of succession of the State of California.

6.

Following the death of said Edith Huff, one of the Trustors herein named, should she be survived by W. A. Huff, the other Trustor herein named, all the household

(Trustee's Exhibit No. 1.)

furniture and fixtures, and automobiles, together with the personal effects of the Trustor, Edith Huff, shall be distributed by the said Trustee (provided an assignment of same has been made to the Trustee and still remains in its hands) to the said Trustor, W. A. Huff.

All the rest, residue and remainder of the trust estate is to remain in trust until the death of said W. A. Huff and said W. A. Huff is to manage said trust estate, and the Trustee shall not be liable for the management of said trust estate so managed by said W. A. Huff following the death of said Edith Huff, and by said W. A. Huff is to retain the income from said trust estate, together with as much of the principal thereof as he may need for his comfort and support, but, nevertheless, not to exceed a portion of the principal in excess of one-half thereof.

Following the death of said W. A. Huff the trust estate then remaining in the hands of the Trustee, after his funeral expenses, expenses of last illness and all his legal debts have been paid, shall be distributed in the same manner as though the said Edith Huff had survived him and died thereafter as hereinbefore provided. [30]

7.

It is, however, stipulated and provided as a condition of this trust, controlling all other provisions of this trust and anything to the contrary herein notwithstanding, that this trust shall terminate and end immediately upon the deaths of the Trustors and all the herein specifically named Beneficiaries, who shall be alive at the date of the execution of this trust, and at said time the Trustee shall distribute all of the principal or corpus of this trust remaining in its hands to the persons entitled thereto as herein provided.

(Trustee's Exhibit No. 1.)

8.

Should the Trustors, during the life of this trust, request the Trustee in writing to manage said trust estate, or should the said W. A. Huff, following the death of the said Edith Huff, request the Trustee in writing to manage said trust estate, the Trustee shall then enter into possession of said trust estate, manage and control the said trust estate in the same manner as provided in paragraph three hereof.

9.

The net income from the said trust estate during the management of said trust estate by said Trustee, should it manage said trust estate as provided in paragraph ten hereof, shall be paid to or for the maintenance and comfort of both of said Trustors, together with as much of the principal of the trust estate as may be necessary for the maintenance and comfort of both of said Trustors.

10.

From such time as the said Trustee takes over the management of the said trust estate, following the death of W. A. Huff, or following the death of both of the Trustors, or should it manage said trust estate as provided in paragraph eight hereof, there shall first be paid from the gross income received or [31] derived from said trust estate, or the principal thereof as the Trustee may deem advisable and necessary, or any part thereof, all taxes, including income tax, federal estate and state inheritance taxes, costs, charges and expenses incurred in the care, administration and protection of said trust estate and in the protection of this trust and its defense against legal and equitable attack by any person or persons, and the

(Trustee's Exhibit No. 1.)

Trustee shall receive a compensation for acting as Trustee hereunder of five per cent (5%) of the gross income of the said trust estate during the time it shall manage said trust estate or any part thereof, and upon the termination of said trust estate or the distribution of any corpus or principal thereof, the Trustee shall receive a compensation, in addition thereto, of one per cent (1%) of the reasonable value of all the corpus or principal of the trust estate distributed according to the terms hereof and for the final closing and settlement of this trust. And the Trustee shall receive a compensation for carrying the trust estate but while not actually managing said trust estate of Twenty Dollars (\$20.00) yearly.

11.

Each and every beneficiary under this trust is hereby restrained from, and shall be without right, power and/or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate, or in any other manner affect or impair his or her beneficial and/or legal rights, titles, interests, claims and/or estates in and/or to the income and/or principal of this trust during the entire term thereof, nor shall the rights, titles, interests, and/or estates of any beneficiary hereunder be subject to the rights or claims of the creditors of any beneficiary nor subject nor liable to any process of law or Court upon the claim of any such creditor, and all the income and/or principal under this trust shall be transferable, payable and/or [32] deliverable, only, solely, exclusively, and personally to the herein designated beneficiaries, or their lawful guardian or guardians hereunder at the time they are entitled to take the same under the terms of this trust, and the per-

(Trustee's Exhibit No. 1.)

sonal receipt of the designated beneficiary hereunder, or their lawful guardian, shall be a condition precedent to the payment or delivery of the same by said Trustee.

12.

The said Trustors herein named reserve to themselves the exclusive possession and use and enjoyment in, and all rights to, the rents, issues and profits of all the property herein set forth in Exhibit "A", and all other properties that may be hereafter transferred, assigned, set over or conveyed to the Trustee, and each of said properties, for and during the term of the natural lives of both of said Trustors herein named; and it is further understood that this trust, being gratuitously created by said Trustors hereinbefore named, the right and power is hereby reserved unto said Trustors to revoke or amend this trust, in whole or in part, at any time, at their pleasure, during the lives of both of said Trustors, by request in writing addressed and delivered to said Trustee; and the Trustors further reserve the right to revoke any or all of said transfers, assignments or conveyances as to any of the property in Exhibit "A" described, or any other property which may be transferred, assigned or conveyed to said Trustee under this trust, upon giving said Trustee notice in writing, duly executed by both of said Trustors before an officer duly authorized to administer oaths. A provision governing this trust provides that, following the death of either of the Trustors, the surviving Trustor shall not have the right to revoke or amend this trust, in whole or in part, and shall not reserve the right to revoke any of the said transfers, assignments or conveyances as to any of the property in Exhibit "A" [33] described, or any other property which may be transferred, assigned or conveyed

(Trustee's Exhibit No. 1.)

to said Trustee under this trust, except that in the event of the death of either of the Trustors the surviving Trustor

~~Trustor~~ reserves the right to amend or alter this Declaration of Trust insofar as the same relates to the distribution of the one-half of the trust estate herein provided to be distributed to the family of said surviving Trustor by changing the name of the Beneficiaries or changing the amounts any Beneficiary is entitled to, such amendment to be made in writing acknowledged before an officer authorized to administer oaths and filed with the Trustee during the lifetime of the said surviving Trustor.

13.

The Trustee hereby agrees to act under the terms of this instrument upon the following conditions:

Except for its wilful default or gross negligence, it shall not be liable to any one, and when in its discretion it acts upon legal counsel selected and employed by it in good faith in accordance with the opinion of such counsel, it shall not be liable for any result of such action, and should it be called upon to perform unlooked for or unanticipated duties in connection with this trust, not specifically provided for, it shall receive a reasonable compensation for the performance and discharge of such duties and for fees for such attorneys as it shall select and employ, and the Trustee does not and shall not assume any obligation to pay for or on account of any one whomsoever, any money except as herein specified or provided, except at its option so to do, nor shall said Trustee be required to pay anything to any one unless there is sufficient money in said trust fund so to do.

(Trustee's Exhibit No. 1.)

In Witness Whereof, said The First National Bank of Santa Ana, in its capacity as Trustee, has caused this instrument to be executed by its proper officer thereunto [34] duly authorized, under its corporate seal, this 10th day of May, 1927.

THE FIRST NATIONAL BANK OF SANTA ANA.

By E. B. Sprague Asst. Trust Officer.

Trustee.

We, the undersigned, named in the foregoing Declaration of Trust as Trustors, do hereby approve, ratify and confirm the same in all its parts, and we do hereby agree respectively to be bound by all the terms thereof.

Dated this 10th day of May, 1927.

W. A. Huff

Edith Huff [35]

State of California,
County of Orange—ss.

On this 10th day of May, 1927, before me, E. Virginia Craig, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared E. B. Sprague, known to me to be the Assistant Trust Officer of the corporation described in and that executed the within instrument, and acknowledged that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

E. Virginia Craig.

Notary Public in and for said County and State.

(Trustee's Exhibit No. 1.)

State of California,

County of Orange,—ss.

On this 10th day of May, 1927, before me, E. Virginia Craig, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared W. A. Huff and Edith Huff, known to me to be the persons described in and that executed the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

E. Virginia Craig.

Notary Public in and for said County and State. [36]

(Trustee's Exhibit No. 1.)

EXHIBIT "A" TO
DECLARATION OF TRUST NO. 245
W. A. HUFF and EDITH HUFF, TRUSTORS,
THE FIRST NATIONAL BANK OF SANTA ANA,
TRUSTEE.

The following described real and personal property has been transferred, assigned and conveyed to the Trustee to be held in trust by the Trustee for the Trustors:

1— Certificate No. 94 for 10 shares of the capital stock of The Abstract and Title Guaranty Company, par value \$100 each, issued in the name of W. A. Huff on the 22nd day of November, 1909.

2— Certificate No. 2 for 12 shares of the capital stock of Broadway Improvement Company, par value \$100 each, issued in the name of W. A. Huff on the 23rd day of June, 1922.

3— Certificate No. 9 for 64 shares of the capital stock of Broadway Improvement Company, par value \$100 each, issued in the name of W. A. Huff on the 22nd day of November, 1922.

4— Certificate No. 51 for 35 shares of the capital stock of Broadway Improvement Company, par value \$100 each, issued in the name of W. A. Huff on the 8th day of February, 1923.

5— Certificates Nos. $\frac{S}{F}$ 17388 and $\frac{S}{F}$ 16231 of the fully paid and non-assessable shares, without nominal or par value of the stock of California Packing Corporation, issued in the name of W. A. Huff on August 5, 1926, and August 2, 1926, respectively, 100 shares each.

(Trustee's Exhibit No. 1.)

6— Bonds Nos. 8600, 8601, 8670, 8671, and 8672 of the State of California, State Highways, each in the amount of \$1000, 5- $\frac{3}{4}$ %, dated July 3, 1921, due July 3, 1934, interest payable January 3 and July 3; with interest coupons Nos. 16 to 30, both inclusive, each in the amount of \$28.75 attached to each bond.

7— Joint Stock Farm Loan Bond No. MI36211 of the California Joint Stock Land Bank of San Francisco, California, in the amount of \$1000, coupon bond issued November 1, 1921, redeemable after November 1, 1931; payable November 1, 1951, interest payable May 1 and November 1; with interest coupons Nos. 12 to 60, both inclusive, each in the amount of \$25.00, attached.

8— Certificate No. 1 for 5 shares of the capital stock of The Farmers and Merchants Savings Bank of Santa Ana, par value \$100 each, issued in the name of W. A. Huff on the 19th day of June, 1919.

9— Certificate No. E761 for 145 shares of the Capital Stock of The First National Bank of Santa Ana, par value \$100 each, issued in the names of W. A. Huff and Edith Huff, Joint Tenants with right of Survivorship, on May 3, 1927. [37]

10— Mortgage Certificate No. 1029 of the Federal Finance Company, Inc., for \$5000, issued January 16, 1925, to W. A. Huff, with interest coupons Nos. 9 and 10, each in the amount of \$175, attached.

11— Mortgage Certificate No. 1030 of the Federal Finance Company, Inc., for \$5000, issued to W. A. Huff on January 16, 1925, with interest coupons Nos. 9 and 10, each in the amount of \$175, attached.

(Trustee's Exhibit No. 1.)

12— Mortgage Certificate No. 1031 of the Federal Finance Company, Inc., for \$2000, issued to W. A. Huff on January 16, 1925, with interest coupons Nos. 5 to 10, both inclusive, each in the amount of \$60.00, attached.

13— Mortgage Certificate No. 1090 of the Federal Finance Company, Inc., for \$5000, issued to Edith Huff on April 29, 1926, with interest coupons Nos. 2 to 6, both inclusive, each in the amount of \$175, attached.

14— Mortgage Certificate No. 1129 of the Federal Finance Company, inc., for \$1000, issued to W. A. Huff on July 19, 1926, with interest coupons Nos. 2 to 6, both inclusive, each in the amount of \$35.00, attached.

15— Certificate No. 5 for 1 share of the capital stock of the Federal Finance Company, Inc., issued to W. A. Huff and Edith Huff, as joint tenants, on December 20, 1922, par value \$100 per share.

16— Certificate No. 36 for 49 shares of the capital stock of the Federal Finance Company, Inc., issued to W. A. Huff and Edith Huff, as joint tenants, on May 1, 1923, par value \$100 per share.

17— Certificate No. 176 for 25 shares of the capital stock of the Federal Finance Company, Inc., issued to W. A. Huff and Edith Huff, as joint tenants, August 15, 1924, par value \$100 per share.

18— Certificate No. 261 for 25 shares of the capital stock of the Federal Finance Company, Inc., issued to W. A. Huff and Edith Huff, as joint tenants, December 19, 1924, par value \$100 per share.

(Trustee's Exhibit No. 1.)

19— Certificate No. 309 for 60 shares of the capital stock of the Federal Finance Company, Inc., issued to W. A. and Edith Huff, as Joint Tenants, January 15, 1926, par value \$100 per share.

20— Certificate No. 410 for 40 shares of the capital stock of the Federal Finance Company, Inc., issued to W. A. and Edith Huff, Joint tenants with right of survivorship, February 14, 1927, par value \$100 per share.

21— Certificate No. A 1047 for 10 shares of the Preferred Capital Stock of Goodyear Tire & Rubber Company of California, issued in the name of [38] W. A. Huff on January 2, 1920, par value \$100 per share.

22— Certificate No. A 4819 for 10 shares of the Preferred Capital Stock of Goodyear Tire & Rubber Company of California, issued in the name of W. A. Huff on October 4, 1920, par value \$100 per share.

23— Certificate No. C 8 for 50 shares of the Globe Grain and Milling Company Common Capital Stock, issued in the name of W. A. Huff on June 5, 1919, par value \$100 each.

24— Certificate No. C 955 for 12 shares of the Common Capital Stock of Globe Grain and Milling Company issued in the name of W. A. Huff on September 22, 1920, par value \$100 per share.

25— Certificate No. C1690 for 38 shares of the Common Capital Stock of Globe Grain and Milling Company issued in the name of W. A. Huff on November 10, 1920, par value \$100 per share.

(Trustee's Exhibit No. 1.)

26— Certificate No. 594 for 3 shares of the Capital Stock, Preferred, Series F Redeemable July 1, 1927, Globe Grain and Milling Company, issued in the name of W. A. Huff on May 27, 1919, par value \$100 per share.

27— Certificate No. 595 for 3 shares of the Preferred Capital Stock, Series G Redeemable July 1, 1928, Globe Grain and Milling Company, issued in the name of W. A. Huff on May 27, 1919, par value \$100 per share.

28— Certificate No. 596 for 3 shares of the Preferred Capital Stock, Series H Redeemable July 1, 1929, Globe Grain and Milling Company, issued in the name of W. A. Huff on May 27, 1919, par value \$100 per share.

29— Bonds Nos. M 1341, M 1342, M 1343, M 1344 and M 1345, Garden Foundation, Incorporated, First Mortgage $6\frac{1}{4}\%$ Sinking Fund Gold Bonds, each in the sum of \$1000, principal due January 1, 1937, interest payable July 1 and January 1, with interest coupons Nos. 1 to 20, both inclusive, each in the amount of \$31.25, attached.

30— Certificate No. 4353 for 10 shares of Installment Stock (for 10 shares of the Capital Stock) of the Home Mutual Building and Loan Association of Santa Ana, issued to W. A. Huff and Edith Huff as joint tenants with the right of survivorship, dated January 2, 1917, Series No. 40, par value \$200 per share.

31— Certificate No. 551 for 50 shares of the capital stock of Holly Oil Company issued to W. A. Huff on July 22, 1921, par value \$5.00 per share.

(Trustee's Exhibit No. 1.)

32— Certificate No. 2 for 1 share of the Capital Stock of W. A. Huff Co. issued to Edith Huff, par value \$500 per share. [39]

33— Certificate No. 7 for 58½ shares of the Capital Stock of W. A. Huff Co. issued to W. A. Huff on August 1, 1922, par value \$500 per share.

34— Certificate No. 8 for 1½ shares of the Capital Stock of W. A. Huff Co. issued to Edith Huff on August 1, 1922, par value \$500 per share.

35— Certificate No. 11 for 14 shares of the Capital Stock of W. A. Huff Co. issued to W. A. Huff on February 14, 1927, par value \$500 per share.

36— Membership Certificate No. 125 of the Santa Ana Industrial Fund issued to W. A. Huff on January 6, 1917.

37— Joint Stock Farm Loan Bonds Nos. MI30946, MI30947, MI30948, MI30949, and MI30950 of The Central Iowa Joint Stock Land Bank of Des Moines, Iowa, each in the sum of \$1000, issued November 1, 1921, redeemable after November 1, 1931, payable November 1, 1951, interest payable May 1 and November 1; with Interest Coupons Nos. 12 to 60, both inclusive, each in the sum of \$27.50, attached to each bond.

38— Trust Certificate No. 45, Trust No. 6036, for 50 shares of the Capital Stock of The Los Angeles Morris Plan Company, issued to W. A. Huff on March 18, 1926, by the Security Trust & Savings Bank of Los Angeles, California.

39— Bonds Nos. 17, 18, and 19 of the La Verne City School District, 6%, each in the sum of \$1000,

(Trustee's Exhibit No. 1.)

principal due April 1, 1932, interest payable April 1, with interest coupons Nos. 7 to 11, both inclusive, each in the amount of \$60.00, attached to each bond.

40— Fourth Liberty Loan $4\frac{1}{4}\%$ Gold Bonds of 1933-1938 Nos. K00565160, H00565158, G00565167, J00565159, and Dolo26184, each in the amount of \$1000, interest payable April 15 and October 15; with Interest Coupons Nos. 18 to 40, both inclusive, each in the amount of \$21.25, attached to each bond.

41— Bonds Nos. M7570 and M7571, Morris & Company, each for \$1000, $7\frac{1}{2}\%$ Ten-Year Sinking Fund Gold Note, principal due September 1, 1930, interest payable March 1 and September 1; with Interest Coupons Nos. 14 to 20, both inclusive, each in the sum of \$37.50, attached to each bond.

42— Bonds Nos. M 254, M 255, M 256, M 257, and M 258, Mortgage Insurance Corporation Insured First Mortgage Gold Certificate, Issue No. 18, 1927, 6%, each for \$1000, principal due February 1, 1934, interest payable August 1 and February 1; interest coupons Nos. 1 to 14, both inclusive, each in the amount of \$30.00, attached to each bond. [40]

43— Certificate No. 125 for 10 shares of the Preferred capital stock of Nicholls Grain & Milling Company, issued to W. A. Huff on April 24, 1924, par value \$100 per share.

44— Bonds Nos. 86 and 87, Delhi Drainage District, County of Orange, State of California, dated August 14, 1909, each for \$250, 5%, principal due January 1, 1930, interest payable January 1 and July 1; with interest coupons Nos. 36 to 41, both inclusive, each in the sum of \$6.25, attached to each bond.

(Trustee's Exhibit No. 1.)

45— Bonds Nos. 46, 47, and 48, United States of America, County of Orange, State of California, Newport Drainage District, dated November 1, 1910, 5%, each for \$150, Series No. 7, interest payable January 1 and July 1; principal due January 1, 1928; Interest Coupons Nos. 34 and 35 each for \$3.75 attached to each bond.

46— Bonds, Nos. 66, 67, 68, and 69, United States of America, County of Orange, State of California, Newport Drainage District, dated November 1, 1910, 5%, each for \$150, Series No. 8, interest payable January 1 and July 1; principal due January 1, 1929; Interest Coupons Nos. 34 to 37, both inclusive, each for \$3.75, attached to each bond.

47— Bonds Nos. 70, 71 and 72, United States of America, County of Orange, State of California, Newport Drainage District, dated November 1, 1910, 5%, Series No. 9, each for \$150; interest payable January 1 and July 1; principal due January 1, 1930; Interest Coupons Nos. 34 to 39, both inclusive, each for \$3.75, attached to each bond.

48— Bonds Nos. 85, 86, 87, and 88, United States of America, County of Orange, State of California, Newport Drainage District, dated November 1, 1910, 5%, Series No. 10, each for \$150; interest payable January 1 and July 1; principal due January 1, 1931; Interest Coupons Nos. 34 to 41, both inclusive, each for \$3.75, attached to each bond.

49— Certificate No. 116 for 16 shares of the Guarantee Capital Stock of the Orange Building & Loan Association, issued to W. A. Huff on January 22, 1926, par value \$200 per share.

(Trustee's Exhibit No. 1.)

50— Certificate No. 168 for 40 shares of the capital stock of the Orange County Title Company, issued to W. A. Huff and Edith Huff, his wife, as joint tenants with the right of survivorship, on November 9, 1917; par value \$100 per share.

51— Certificate No. 283 for 30 shares of the capital stock of The Peoples Finance & Thrift Company of Santa Ana, issued to W. A. Huff on February 13, 1924, par value \$100 per share.

52— Bonds Nos. M1395 and M1396, Pan American Petroleum & Transport Company, First Lien Ten Year [41] Marine Equipment 7% Convertible Gold Bond, for \$1000 each, due August 1, 1930; interest payable February 1 and August 1; Interest Coupons Nos. 14 to 20, both inclusive, each for \$35.00, attached to each bond.

53— Bond No. 42, Road District Improvement Bond, Road Improvement District No. 5, United States of America, State of California, County of Orange, for \$260, 7%, principal due October 4, 1927, interest payable January 2 and July 2; with Interest Coupons Nos. 12 and 13, for \$9.10 and \$4.65, respectively, attached.

54— Bond No. 49, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$260, 7%, principal due October 4, 1928, interest payable January 2 and July 2; with interest Coupons Nos. 12 to 14, both inclusive, each for \$9.10, and Coupon No. 15 for \$4.65, attached.

55— Bond No. 56, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District

(Trustee's Exhibit No. 1.)

No. 5, for \$260, 7%, principal due October 4, 1929, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 16, both inclusive, each for \$9.10, and Coupon No. 17 for \$4.65, attached.

56— Bond No. 63, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$260, 7%, principal due October 4, 1930, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 18, both inclusive, each for \$9.10, and Interest Coupon No. 19 for \$4.65, attached.

57— Bond No. 70, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$260, 7%, principal due October 4, 1931, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 20, both inclusive, each for \$9.10, and Interest Coupon No. 21 for \$4.65, attached.

58— Bond No. 77, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$260, 7%, principal due October 4, 1932, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 22, both inclusive, each for \$9.10, and Interest Coupon No. 23 for \$4.65, attached.

59— Bond No. 84, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$260, 7%, principal due October 4, 1933, interest payable January 2 and July 2; with Inter- [42] est Coupons Nos. 12 to 24, both inclu-

(Trustee's Exhibit No. 1.)

sive, each for \$9.10, and Interest Coupon No. 25 for \$4.65, attached.

60— Bond No. 91, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$260, 7%, principal due October 4, 1934, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 26, both inclusive, each for \$9.10, and Interest Coupon No. 27 for \$4.65, attached.

61— Bond No. 98, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$260, 7%, principal due October 4, 1935, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 28, both inclusive, each for \$9.10, and Interest Coupon No. 29 for \$4.65, attached.

62— Bond No. 102, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$1000, 7%, principal due October 4, 1936, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 30, both inclusive, each for \$35.00, and Interest Coupon No. 31 for \$17.89, attached.

63— Bond No. 103, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$1000, 7%, principal due October 4, 1936, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 30, both inclusive, each for \$35.00, and Interest Coupon No. 31 for \$17.89, attached.

(Trustee's Exhibit No. 1.)

64— Bond No. 104, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$500, 7%, principal due October 4, 1936, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 30, both inclusive, each for \$17.50, and Interest Coupon No. 31 for \$8.94, attached.

65— Bond No. 105, United States of America, State of California, County of Orange, Road District Improvement Bond, Road Improvement District No. 5, for \$260, 7%, principal due October 4, 1936, interest payable January 2 and July 2; with Interest Coupons Nos. 12 to 30, both inclusive, each for \$9.10, and Interest Coupon No. 31 for \$4.65, attached.

66— Certificate No. NY—D 66007 for 100 shares of the capital stock of the Standard Oil Company of California, without nominal or par value, issued to William A. Huff on February 18, 1927. [43]

67— Certificate No. NY78110 for 100 shares of the common stock of Shell Union Oil Corporation, without nominal or par value, issued to William A. Huff on April 7, 1927.

68— Certificate No. 6 for 75 shares of the capital stock of Santora Land Co. issued to W. A. Huff on November 1, 1922, par value \$100 per share.

69— Certificate No. 24 for 15 shares of the capital stock of Santora Land Co. issued to W. A. Huff on November 1, 1922, par value \$100 per share.

70— Certificate No. 93 for 5 shares of the capital stock of Santa Ana Valley Hospital issued to W. A. Huff on October 2, 1923, par value \$100 per share.

(Trustee's Exhibit No. 1.)

71— Certificate of Membership in the Santa Ana Country Club, No. 124, issued to W. A. Huff,

72— Certificate No. A700 for 100 shares of the Preferred Series B 6% capital stock of the Southern California Edison Company, issued to W. A. Huff and Edith Huff as joint tenants with full rights of survivorship on April 28, 1926, par value \$25.00 each.

73— Certificate No. A701 for 100 shares of the Preferred Series B 6% capital stock of the Southern California Edison Company, issued to W. A. Huff and Edith Huff as joint tenants with full rights of survivorship on April 28, 1926, par value \$25.00 each.

74— Bonds Nos. 56, 57, 58, 59, and 60, State of California, Series B 6% Street Improvement Bond Certificate, non-callable, each for \$1000, principal due March 15, 1931, interest payable on March 15 and September 15; Interest Coupons Nos. 5 to 12, both inclusive, each for \$30.00, attached to each bond.

75— Certificate No. 193 for 10 shares, permanent, Non-withdrawable Guarantee, of the Capital Stock of Santa Ana Building and Loan Association, Santa Ana, California, issued to W. A. Huff or Edith Huff, either or the survivor, on April 23, 1925.

76— Certificate No. 352 for 35 shares of the Preferred Capital Stock of Southern Service Company, issued to W. A. Huff on March 11, 1922, par value \$100 per share.

77— Certificate No. 399 for 8 shares of the Preferred Capital Stock of Southern Service Company, issued to W. A. Huff on May 31, 1922, par value \$100 per share.

(Trustee's Exhibit No. 1.)

78— Certificate No. 651 for 2 shares of the Preferred Capital Stock of Southern Service Company, issued to W. A. Huff on March 4, 1924, par value \$100 per share. [44]

79— Certificate No. 881 for 4 shares of the Preferred Capital Stock of Southern Service Company, issued to W. A. Huff on May 21, 1925, par value \$100 per share.

80— Certificate No. 1168 for 7 shares of the Preferred Capital Stock of Southern Service Company, issued to W. A. Huff on July 1, 1926, par value \$100 per share.

81— Certificate No. 2 for 1 share of the capital stock of St. Ann's Inn issued to W. A. Huff on July 12, 1922, par value \$100 per share.

82— Certificate No. 72 for 34 shares of the capital stock of St. Ann's Inn issued to W. A. Huff on July 18, 1922, par value \$100 per share.

83— Bonds Nos. 55, 56, 57, 58, and 59, United States of America, State of California, Santa Ana School District of Orange County, each for \$1000, 5% principal due March 1, 1928, interest payable March 1 and September 1; with Interest Coupons Nos. 11 and 12, each for \$25.00, attached to each bond.

84— Certificate No. 176 for 409 shares of the capital stock of the Vanderlip Oil Company issued to W. A. Huff on June 6, 1901, par value \$1.00 per share.

85— Certificate No. 206 for 182 shares of the capital stock of the Vanderlip Oil Company issued to W. A. Huff on June 10, 1901, par value \$1.00 per share.

(Trustee's Exhibit No. 1.)

86— Certificate No. 314 for 50 shares of the capital stock of Western States Life Insurance Co. issued to W. A. Huff on February 14, 1910, par value \$10.00 per share.

87— Certificate No. 1187 for 50 shares of the capital stock of Western States Life Insurance Co. issued to W. A. Huff on April 29, 1910, par value \$10.00 per share.

88— Certificate No. P 1274 for 50 shares of the Preferred Capital Stock of Zellerbach Corporation issued to W. A. Huff and Edith Huff as joint tenants with right of survivorship but not tenants in common on March 29, 1926, without par value; redemption price per share \$120.00.

89— Certificate No. E 762 for 10 shares of the capital stock of The First National Bank of Santa Ana, issued to W. A. Huff on May 3, 1927, par value \$100 per share.

90— Promissory note for \$5000 dated June 24, 1925, due three years after date, executed by J. E. Cope and Mary C. Cope in favor of The Farmers & Merchants Savings Bank of Santa Ana, with interest at 7% per annum, payable semi-annually; secured [45] by a mortgage of even date and terms recorded June 27, 1925, in Volume 352, of Mortgages, page 195, Orange County Records.

91— Promissory note for \$10,000 dated September 18, 1926, due three years after date, executed by H. A. Lake and Edith M. Lake in favor of The Farmers & Merchants Savings Bank of Santa Ana, with interest at 7%, per annum, payable semi-annually; secured by a mortgage of even date and terms

(Trustee's Exhibit No. 1.)

recorded October 1, 1926, in Volume 386 of Mortgages, page 165, Orange County Records.

92— Promissory note for \$5000 dated May 4, 1925, due three years after date, executed by John H. Meyer and Katharine M. Meyer in favor of The Farmers & Merchants Savings Bank of Santa Ana, with interest at 7% per annum, payable semi-annually; secured by a mortgage of even date and terms recorded May 12, 1925, in Volume 349 of Mortgages, Page 112, Orange County Records.

93— Promissory note for \$7000 dated July 8, 1925, due three years after date, executed by Harry Woodington and Rella Woodington in favor of The Farmers & Merchants Savings Bank of Santa Ana, with interest at 7% per annum, payable semi-annually; secured by a mortgage of even date and terms recorded July 16, 1925, in Volume 353 of Mortgages, page 297, Orange County Records.

94— Promissory note for \$11,500 dated July 27, 1925, due three years after date, executed by Edward M. Blake and Mary Otis Blake, in favor of The Farmers & Merchants Savings Bank of Santa Ana, with interest at 7% per annum, payable semiannually; secured by a mortgage of even date and terms recorded August 1, 1925, in Volume 354 of Mortgages, page 187, Orange County Records.

95— Promissory note for \$15,000 dated June 15, 1925, due five years after date, executed by Victor

(Trustee's Exhibit No. 1.)

Walker and Mrs. Elva B. Walker in favor of The Farmers & Merchants Savings Bank of Santa Ana, with interest at 7% per annum, payable quarterly; secured by a mortgage of even date recorded June 16, 1925, in Volume 351 of Mortgages, page 200, Orange County Records.

96— Promissory note for \$9000 dated June 5, 1925, due three years after date, executed by Holmes Loan & Realty Company in favor of Grace G. Reid, with interest 7% per annum, payable semi-annually; secured by a mortgage of even date recorded June 17, 1925, in Volume 352 of Mortgages, page 74, Orange County Records. [46]

97— Promissory note for \$22,500 dated March 25, 1926, due three years after date, executed by Phillip Lutz and Rosa C. Lutz in favor of The Farmers & Merchants Savings Bank of Santa Ana, with interest at 7% per annum, payable semi-annually; secured by a mortgage of even date recorded March 27, 1926, in Volume 369, of Mortgages, Page 239, Orange County Records.

98 Certificate No. SF—C 27572 for 50 shares of the capital stock of Standard Oil Company of California, issued in the name of William A. Huff on April 23, 1927, without nominal or par value.

99— Assignment executed by W. A. Huff and Edith Huff, covering: "All moneys now on deposit, or which may hereafter be deposited to the credit of

(Trustee's Exhibit No. 1.)

us, or either of us, in The Farmers and Merchants Saving Bank of Santa Ana, Santa Ana, California."

100— Assignment executed by W. A. Huff and Edith Huff covering: "All our household goods, including pictures, silverware, rug and bric-a-brac, together with all our jewelry, clothing and personal effects, located in our home at 129 Buene Vista Boulevard, East Newport, California."

101— Assignment executed by W. A. Huff and Edith Huff covering: "All our household goods, including pictures, silverware, rug and bric-a-brac, together with all our jewelry and personal effects and clothing, located in our home at 316 Cypress Avenue, Santa Ana, California."

102— Bill of Sale executed by W. A. Huff covering: 1923 Model 90, Detroit-Electric Brougham with Motor Number S 13217; and 1926, Model 314, Cadillac 7 ps. Sub. with Motor Number M 100692.

103— Assignment of contract dated May 6, 1927, executed by W. A. Huff and Edith Huff as party of the first part, and H. J. Lowe as party of the second part, covering certain shares of stock in the W. A. Huff Company.

The foregoing described property, covered by Exhibit "A", is hereby made a part of the property held under Trust No. 245 (W. A. Huff), this 10th day of May, 1927.

THE FIRST NATIONAL BANK OF SANTA ANA.

By E. B. Sprague

(Seal) Assistant Trust Officer. [47]

(Trustee's Exhibit No. 1.)

EXHIBIT "A-1"

TO DECLARATION OF TRUST NO. 245,
W. A. HUFF AND EDITH HUFF, TRUSTORS,
THE FIRST NATIONAL BANK OF SANTA ANA,
TRUSTEE.

All that certain real property situated in the City of Santa Ana, County of Orange, State of California, described as follows:

Parcel 1.

1— Beginning at a point 75 feet North of the Southeast corner of Lot Nine (9) in Block "E" of "Blee's Second Addition to the Town of Santa Ana", as shown on a Map recorded in Book 30, page 75 of Miscellaneous Records of Los Angeles County, California; running thence West 150 feet to the East line of an alley; thence South 10 feet; thence East 150 feet to the West line of Cypress Avenue, and thence North 10 feet to the place of beginning, and being the North 10 feet of the South 75 feet of Lots Seven (7), Eight (8) and Nine (9) in said Block "E".

2— Commencing at a point 75 feet North of the Southeast corner of Lot Nine (9) in Block "E" of "Blee's Second Addition to the Town of Santa Ana", as shown on a Map recorded in Book 30, page 75 of Miscellaneous Records of Los Angeles County, California; running thence North along the West line of Cypress Avenue 50 feet; thence West 150 feet to the

(Trustee's Exhibit No. 1.)

East line of an alley; thence South 50 feet and thence East 150 feet to the place of beginning and being the North 50 feet of Lots 7, 8 and 9 in said Block "E".

3— The West 25 feet of Lots Eight (8) and Nine (9) in Block Eleven (11) of the "Town of Santa Ana", as shown on a Map recorded in Book 2, page 51 of Miscellaneous Records of Los Angeles County, California.

4— Commencing at a point 75 feet West of the Northeast corner of Block Eleven (11) of the Town (now City) of Santa Ana, as shown on a Map recorded in Book 2, page 51 of Miscellaneous Records of Los Angeles County, California, and running thence South 100 feet; thence West 25 feet; thence North 100 feet; thence East 25 feet to the point of beginning, it being a portion of Lots Eight (8) and Nine (9) in said Block Eleven (11).

5— Lot One (1) of the Subdivision of Block "A" of East Newport as shown on a Map recorded in Book 4, page 51 of Miscellaneous Maps, records of Orange County, California,

Parcel 2.

1— Beginning at the Southwest corner of Lot One (1) in Block Fourteen (14) of the "Town of Santa Ana", as shown on a Map recorded in Book 2, page 51 of Miscellaneous Records of Los Angeles County, California: running thence North along the West line of said Lot One (1) a distance of 50 feet; thence

(Trustee's Exhibit No. 1.)

West 24 feet; thence South 50 feet, and thence East 24 feet to the point of beginning.

Subject to agreements relative to construction and maintenance of sewer, recorded in Book 2, page 219 of Miscellaneous Records of Orange County, California, and in Book 2, page 221 of Miscellaneous Records of Orange County, California. [48]

2— The West 31 feet of Lots One (1) and Four (4) in Block Fourteen (14) of the "Town of Santa Ana", as shown on a Map recorded in Book 2, page 51 of Miscellaneous Records of Los Angeles County, California.

3— Commencing at the Southeast corner of Lot Three (3) in Block Fourteen (14) of the "Town of Santa Ana", as shown on a Map recorded in Book 2, page 51 of Miscellaneous Records of Los Angeles County, California; thence North 50 feet; Thence West 24 feet; thence South 50 feet, and thence East 24 feet to beginning.

Subject to a right of way for ingress and egress over a strip 6 feet wide off the North end thereof. Also subject to a right of way for sewer purposes not exceeding 8 feet in width, the center line of which is parallel to and 45 feet North of the South line of said Lot Three (3).

Also hereby conveying the right of way for ingress and egress over a strip of land 6 feet wide off the South side of Lot Six (6) in said Block Fourteen

(Trustee's Exhibit No. 1.)

(14) and over the North 6 feet of the West 101 feet of said Lot Three (3), conveyed to George W. Minter by deed recorded in Book 289, page 164 of Deeds, records of Orange County, California.

Also hereby conveying all interest of the Grantor in the wall described in the Agreement between W. A. Huff, party of the first part, and George W. Minter, W. A. Huff and Edith Huff, his wife, parties of the second part, recorded in Book 300, page 88 of Deeds, records of Orange County, California, and all interest of the Grantor in said Agreement.

Parcel 3.

Lots Two (2) and Three (3) and the South six (6) inches of Lot Six (6), all in Block Seven (7) of the Town of Santa Ana, as shown on a Map recorded in Book 2, page 51 of Miscellaneous Records of Los Angeles County, California, and in Book 5, page 46 of Miscellaneous Maps, records of Orange County, California.

Subject to a party wall agreement as recited in the deed from S. J. Jackman et ux to F. E. Farnsworth, recorded in Book 255, page 307 of Deeds, records of Orange County, California.

Parcel 4.

That portion of Lot Sixty-three (63) of Newport Heights, as per map thereof recorded in Book 4, page 83 of Miscellaneous Maps, Records of Orange County, California, described as follows:

(Trustee's Exhibit No. 1.)

Beginning at a point in the Northwestern line of said Lot 63, distant 91.29 feet Southwesterly from the most Northerly corner of said Lot; thence Southeasterly, parallel to the Northeasterly line of said Lot 63, 110 feet; thence Southwesterly, parallel to the Northwestern line of said Lot, 73.79 feet; thence Northwesternly, parallel to the Northeasterly line of said Lot 63, 110 feet to a point in said Northwesternly line of Lot 63; thence Northeasterly 73.79 feet to the point of beginning.

Reserving the Southwesterly $7\frac{1}{2}$ feet of said premises for road and alley purposes.

Subject to rights of way of record.

Also granting a right of way for road and alley purposes over the Southwesterly 15 feet of the Northeasterly 172.58 feet of said Lot 63. [49]

Also granting the Southeasterly one-half of Orange Avenue adjoining the above conveyed premises on the Northwest.

Also subject to unpaid taxes.

Parcel 5.

1— The West 105 feet of Lot Six (6) in Block Thirteen (13) of the Town of Santa Ana, as shown on a Map recorded in Book 2, page 51 of Miscellaneous Records of Los Angeles County, California.

2— Part of Lots Two (2) and Three (3) in Block Thirteen (13) of the said Town of Santa Ana, de-

Trustee's Exhibit No. 1.)

scribed as: Beginning on the North line of Fourth Street at a point $62\frac{1}{2}$ feet East of its intersection with the East Line of West Street; thence North at right angles to Fourth Street 100 feet to the North line of Lot Three (3); thence East on the North line of Lot Three (3), $42\frac{1}{2}$ feet; thence South 100 feet to the North line of Fourth Street, and thence West $42\frac{1}{2}$ feet to beginning.

3— Commencing at a point in the center of a brick wall 105 feet and $2\frac{3}{4}$ inches west of the South-east corner of Lot Two (2), Block Thirteen (13) of said Town of Santa Ana, as shown on a Map recorded in Book 2, page 51 of Miscellaneous Records of Los Angeles County, California, running thence North 100 feet to the North line of Lot Three (3) in said Block Thirteen (13), thence West 19 feet and $9\frac{1}{4}$ inches, more or less, to the Northwest corner of said Lot Three (3); thence South 100 feet along the West line of said Lots Three (3) and Two (2); thence East 19 feet and $9\frac{1}{4}$ inches, more or less, to the point of beginning.

Subject to a right of way for sewer as conveyed by L. Gildmacher to the City of Santa Ana by deed recorded in Book 195, page 117 of Deeds, records of Orange County, California.

The above described real property, covered by Exhibit "A-1", is hereby made a part of the trust property held under Trust No. 245 (Huff).

Dated this 10th day of May, 1927.

THE FIRST NATIONAL BANK OF SANTA ANA

By E. B. Sprague

(SEAL) Asst Trust Officer [50]

(Trustee's Exhibit No. 1.)

EXHIBIT "A-2" TO
DECLARATION OF TRUST NO. 245,
W. A. HUFF AND EDITH HUFF, TRUSTORS,
THE FIRST NATIONAL BANK OF SANTA ANA,
TRUSTEE.

The following described personal property has been delivered to the Trustee to be held in trust for the Trustors:

1— Bonds Nos. 2392 and 2400 of the State of California, County of Nevada, Nevada Irrigation District, Series No. 18, $5\frac{1}{2}\%$ Serial Gold Bond, each for \$1000, principal due July 1, 1953, interest payable January 1 and July 1; with Interest Coupons Nos. 4 to 56, both inclusive, each in the amount of \$27.50, attached to each bond.

2— Bonds Nos. 5781, 5782, and 5783 of the State of California, County of Nevada, Nevada Irrigation District, Series No. 30, $5\frac{1}{2}\%$ Serial Gold Bond, each for \$1000, principal due July 1, 1965, interest payable January 1 and July 1; with Interest Coupons Nos. 4 to 80, both inclusive, each in the amount of \$27.50, attached to each bond.

The above described personal property, covered by Exhibit "A-2", is hereby made a part of the trust property held under Declaration of Trust No. 245 (W. A. Huff).

Dated this 12th day of May, 1927.

THE FIRST NATIONAL BANK OF SANTA ANA
(SEAL) By E. B Sprague
Assistant Trust Officer. [51]

(Trustee's Exhibit No. 1.)

TO THE FIRST NATIONAL BANK OF SANTA ANA, TRUST DEPARTMENT:

Further instructions regarding assignment of our Bank Account, of which a copy *if* hereto attached, same is subject to our drawing checks on said account, the assignment to take effect according to the provisions contained in a certain Declaration of Trust No. 245 (W. A. Huff), whereby The First National Bank of Santa Ana is Trustee and W. A. Huff and Edith Huff are Trustors, and you are instructed not to withdraw any of said moneys until after the death of W. A. Huff; and said The First National Bank of Santa Ana, and the Trust Department thereof, are hereby released from all liability on account of the payment of any checks which we may draw on said account up until the time of the death of said W. A. Huff, or until we turn said balance over to you by check.

Dated this 10th day of May, 1927.

"W. A. Huff"

"Edith Huff"

The foregoing instructions were deposited with us the 10th day of May, 1927.

THE FIRST NATIONAL BANK OF SANTA ANA.
(SEAL) By E B Sprague
Asst. Trust Officer. [52]

(Trustee's Exhibit No. 1.)

AMENDMENT TO DECLARATION OF TRUST
NO. 245, W. A. HUFF, DATED THE 10th, DAY
OF MAY, 1927, WHEREBY THE FIRST NA-
TIONAL BANK OF SANTA ANA IS NAMED
TRUSTEE AND W. A. HUFF AND EDITH
HUFF ARE NAMED AS TRUSTORS.

Whereas, subdivision "First" of paragraph 2 reads as follows:

"First: To S. E. HUFF, brother of the said Trustor, W. A. Huff, the sum of Ten Thousand Dollars (\$10,000). Should said S. E. Huff not be living, then said Ten Thousand Dollars (\$10,000) shall become a part of the residue of the trust estate and distributed as hereinafter provided."; and

Whereas, this Amendment to Trust No. 245 made this date, shall provide that subdivision "First" of paragraph 2 of said Trust No. 245 shall become null and void and shall be effective from this day and date.

Whereas, subdivision "B" of paragraph 3 of said Trust No. 245 reads as follows:

"B—The net income available for distribution from the other part of the trust estate, after deducting the amounts if any, as hereinbefore provided to be paid to Edith Huff, shall be distributed in the following manner:

One-third thereof to S. E. Huff, brother of the Trustor, W. A. Huff, until the death of said Edith Huff, the other Trustor herein named. Should the said S. E. Huff not be surviving or die before the death of said Edith Huff, then from said one-third there shall be paid, provided, said income will permit, the sum of One Hundred Dollars (\$100) a month to the wife of S. E. Huff, pro-

(Trustee's Exhibit No. 1.)

vided she is then living. And any income in excess of One Hundred Dollars (\$100) a month shall be distributed to the said Edith Huff, the other Trustor herein named as long as she shall live.

One-third thereof to Helen Parke, daughter of C. S. Huff, deceased brother W. A. Huff, one of the Trustors herein, until the death of said Edith Huff, the other Trustor herein. Should said Helen Parke not be surviving or die before the death of said Edith Huff, then that part of the income that would have been distributed to her shall be distributed in the following manner: The Trustee shall divide said income among the bodily issue of said Helen Parke per stirpes, provided they have attained the age of eighteen years. Should any of said bodily issue of said Helen Parke not have attained the age of eighteen years, then that part of the income that would have been distributed to them, should they have attained the age of eighteen years, shall be used by said Trustee towards the maintenance and education of said bodily issue not having attained the age of eighteen years; and the remainder thereof, if any, shall be deposited in a savings account for the benefit of said bodily issue who shall not have attained the age of eighteen years, and the income accumulated thereon and distributed to said bodily issue at such time as said bodily issue attain the age of eighteen years respectively; [53] but notwithstanding anything to the contrary herein, same shall terminate on the death of said Edith Huff.

Should there be no bodily issue of said Helen Parke surviving, then the part of the income that would have been distributed to them shall be distributed to her sister, Ethel Huff; should said Ethel Huff not be surviving but

(Trustee's Exhibit No. 1.)

be survived by bodily issue, then the Trustee shall divide said income among the bodily issue of said Ethel Huff per stirpes, provided they have attained the age of eighteen years. Should any of said bodily issue of said Ethel Huff not have attained the age of eighteen years, then from that part of the income that would have been distributed to them, should they have attained the age of eighteen years, shall be used by said Trustee towards the maintenance and education of said bodily issue not having attained the age of eighteen years; and the remainder thereof, if any, shall be deposited in a savings account for the benefit of said bodily issue, who shall not have attained the age of eighteen years, and the income accumulated thereon and distributed to said bodily issue at such time as said bodily issue attain the age of eighteen years respectively; but notwithstanding anything to the contrary herein, same shall terminate on the death of said Edith Huff.

Should said Helen Parke not be surviving and not be survived by bodily issue, or by said Ethel Huff, or by bodily issue of said Ethel Huff, then said part of the income shall be distributed to said Edith Huff as long as she shall live.

One-third thereof to Ethel Huff, daughter of C. S. Huff, deceased brother of W. A. Huff, one of the Trustors herein, until the death of said Edith Huff, the other Trustor herein. Should said Ethel Huff not be surviving or die before the death of said Edith Huff, then that part of the income that would have been distributed to her shall be distributed in the following manner:

The Trustee shall divide said income among the bodily issue of said Ethel Huff per stirpes, provided they have

(Trustee's Exhibit No. 1.)

attained the age of eighteen years. Should any of said bodily issue of said Ethel Huff not have attained the age of eighteen years, then from that part of the income that would have been distributed to them, should they have attained the age of eighteen years, shall be used by said Trustee towards the maintenance and education of said bodily issue not having attained the age of eighteen years; and the remainder thereof, if any, shall be deposited in a savings account for the benefit of said bodily issue not yet eighteen years of age, and the income accumulated thereon and distributed to said bodily issue at such time as said bodily issue attain the age of eighteen years respectively; but notwithstanding anything to the contrary herein, same shall terminate on the death of said Edith Huff.

Should there be no bodily issue of said Ethel Huff surviving, then the part of the income that would have been distributed to them shall be distributed to her sister, Helen Parke; or in the event of her death as provided for, for distribution of her income.

Should said Ethel Huff not be surviving and not be survived by bodily issue, or by said Helen Parke, or by bodily issue of said Helen Parke, then said part of the income shall be distributed to said Edith Huff as long as she shall live.”; and [54]

Whereas, this Amendment to Trust No. 245 made this date shall provide that subdivision “B” of paragraph 3 of said trust No. 245 shall become null and void and in place thereof, the following paragraph shall be known as “B” of original paragraph 3 and shall be effective from this day and date.

B—The net income available for distribution from the other part of the trust estate, after deducting the amounts,

(Trustee's Exhibit No. 1.)

if any, as hereinbefore provided to be paid to Edith Huff, shall be distributed in the following manner:

One-third thereof to S. E. Huff, brother of the Trustor, W. A. Huff, until the death of said Edith Huff, the other Trustor herein named, provided the said S. E. Huff is surviving. Should the said S. E. Huff not be surviving or die before the death of Edith Huff, then from said one-third there shall be paid, provided said income will permit, the sum of Two Hundred Fifty Dollars (\$250) a month to the wife of said S. E. Huff as long as said Edith Huff shall live, and any income in excess of Two Hundred Fifty Dollars (\$250.00) a month shall be distributed to the said Edith Huff, the other Trustor herein named as long as she shall live.

One-third thereof to Helen Parke, daughter of C. S. Huff, deceased brother of W. A. Huff, one of the Trustors herein, until the death of said Edith Huff, the other Trustor herein. Should said Helen Parke not be surviving or die before the death of said Edith Huff, then that part of the income that would have been distributed to her shall be distributed in the following manner: The Trustee shall divide said income among the bodily issue of said Helen Parke per stirpes, provided they have attained the age of eighteen years. Should any of said bodily issue of said Helen Parke not have attained the age of eighteen years, then that part of the income that would have been distributed to them, should they have attained the age of eighteen years, shall [55] be used by said Trustee towards the maintenance and education of said bodily issue not having attained the age of eighteen years; and the remainder thereof, if any, shall be deposited in a savings account for the benefit of said bodily issue who shall not

(Trustee's Exhibit No. 1.)

have attained the age of eighteen years, and the income accumulated thereon and distributed to said bodily issue at such time as said bodily issue attain the age of eighteen years respectively: but notwithstanding any to the contrary herein, same shall terminate on the death of said Edith Huff.

Should there be no bodily issue of said Helen Parke surviving, then the part of the income that would have been distributed to them shall be distributed to her sister, Ethel Huff; should said Ethel Huff not be surviving but be survived by bodily issue, then the Trustee shall divide said income among the bodily issue of said Ethel Huff per stirpes, provided they have attained the age of eighteen years. Should any of said bodily issue of said Ethel Huff not have attained the age of eighteen years, then from that part of the income that would have been distributed to them, should they have attained the age of eighteen years, shall be used by said Trustee towards the maintenance and education of said bodily issue not having attained the age of eighteen years; and the remainder thereof, if any, shall be deposited in a savings account for the benefit of said bodily issue, who shall not have attained the age of eighteen years, and the income accumulated thereon and distributed to said bodily issue at such time as said bodily issue attain the age of eighteen years respectively; but notwithstanding anything to the contrary herein, same shall terminate on the death of said Edith Huff.

Should said Helen Parke not be surviving and not be survived by bodily issue, or by said Ethel Huff, or by bodily issue of said Ethel Huff, then said part of the income shall be distributed to said Edith Huff as long as she shall live. [56]

(Trustee's Exhibit No. 1.)

One-third thereof to Ethel Huff, daughter of C. S. Huff deceased brother of W. A. Huff, one of the Trustors herein, until the death of said Edith Huff, the other Trustor herein. Should said Ethel Huff not be surviving or die before the death of said Edith Huff, then that part of the income that would have been distributed to her shall be distributed in the following manner: The Trustee shall divide said income among the bodily issue of said Ethel Huff per stirpes, provided they have attained the age of eighteen years. Should any of said bodily issue of said Ethel Huff not have attained the age of eighteen years, then from that part of the income that would have been distributed to them, should they have attained the age of eighteen years, shall be used by said Trustee towards the maintenance and education of said bodily issue not having attained the age of eighteen years; and the remainder thereof, if any, shall be deposited in a savings account for the benefit of said bodily issue not yet eighteen years of age, and the income accumulated thereon and distributed to said bodily issue at such time as said bodily issue attain the age of eighteen years respectively; but notwithstanding anything to the contrary herein, same shall terminate on the death of said Edith Huff.

Should there be no bodily issue of said Ethel Huff surviving, then the part of the income that would have been distributed to them shall be distributed to her sister, Helen Parke; or in the event of her death as provided for, for distribution of her income.

Should said Ethel Huff not be surviving and not be survived by bodily issue, or by said Helen Parke, or by bodily issue of said Helen Parke, then said Part of the income shall be distributed to said Edith Huff as long as she shall live.

(Trustee's Exhibit No. 1.)

And Whereas, subdivision "First" of paragraph 5 of said Trust No. 245 reads as follows: [57]

"First: One-third thereof to S. E. Huff, brother of the Trustor, W. A. Huff, provided he is surviving. If he is not surviving but is survived by a wife, then said one-third shall be held in trust and from the net income thereof there shall be paid the sum of One Hundred Dollars (\$100) a month to his wife, provided she is then living; and the remainder of the net income available for distribution from said one-third shall be distributed, share and share alike, to said Helen Parke and Ethel Huff, daughters of said C. S. Huff, deceased brother of the Trustor, W. A. Huff, as long as the said wife of said S. E. Huff shall live. Following the death of said wife of said S. E. Huff, said one-third shall be distributed equally to said Helen Parke and Ethel Huff.

Should said S. E. Huff not be surviving and not be survived by a wife, the said one-third to be distributed to him shall be distributed to said Helen Parke and Ethel Huff, daughters of C. S. Huff, deceased brother of said Trustor, W. A. Huff, share and share alike. If either said Helen Parke or Ethel Huff should not then be living, then the share that would have been distributed to her, had she been living, shall be distributed to her bodily issue per stirpes; if no bodily issue of said Helen Parke or Ethel Huff so dying should be surviving, then said share shall go to the survivor of said Helen Parke or Ethel Huff. Should neither said Helen Parke or Ethel Huff be surviving and no bodily issue of theirs surviving, then said part of the trust estate that would have been

Trustee's Exhibit No. 1.)

distributed to them shall be distributed to the heirs of Edith Huff, one of the Trustors herein, according to the then existing statutes of succession of the State of California." ; and

Whereas, this Amendment to Trust No. 245 made this date shall provide that subdivision "First" of paragraph 5 of said Trust No. 245 shall become null and void and in place thereof the following paragraph shall be known as sub-paragraph "First" of original paragraph 5 and shall become effective from this day and date.

First: Should said S. E. Huff, brother of the Trustor, or his wife survive the said Edith Huff, one of the Trustors herein named, then one-third thereof shall remain in the hands of the Trustee in trust and the net income therefrom shall be distributed to S. E. Huff, brother of the Trustor, as long as he shall live, with the provision that should the net income available for distribution not average Two Hundred Fifty Dollars (\$250) any one month, the Trustee may and is hereby authorized to use sufficient amount of the principal of said one-third so held in trust in addition to the income so as to pay to said S. E. Huff a yearly amount equal to Two Hundred Fifty Dollars (\$250) a month. [58]

Following the death of S. E. Huff, should he be survived by a wife, there shall be paid from the income of said trust estate so held as provided in this subdivision First, a sum to equal Two Hundred Fifty Dollars (\$250) a month to the said wife of S. E. Huff as long as she shall live, and should the net income not be sufficient to permit the Trustee to pay Two Hundred Fifty Dollars (\$250) a month to the said wife of S. E. Huff, the Trustee may and is hereby authorized to use sufficient amount

(Trustee's Exhibit No. 1.)

of the principal in addition to the income so as to pay the sum of Two Hundred Fifty Dollars (\$250) a month provided said trust estate will permit, and the remainder of the net income available for distribution from said one-third shall be distributed share and share alike to the said Helen Parke and Ethel Huff, daughters of C. S. Huff, deceased brother of the Trustor, W. A. Huff.

Following the deaths of S. E. Huff and his wife, said one-third so held, or the remainder thereof, shall be distributed equally to said Helen Parke and Ethel Huff, daughters of said C. S. Huff, deceased. Should S. E. Huff not be surviving at the time of the death of Edith Huff, one of the Trustors herein named, and not be survived by a wife, then the one-third of the trust estate as referred to in this subdivision first of paragraph 5 shall be distributed to Helen Parke and Ethel Huff, daughters of C. S. Huff, deceased brother of the said Trustor, W. A. Huff, share and share alike. If either said Helen Parke or Ethel Huff should not then be living, then the share that would have been distributed to her, had she been living, shall be distributed to her bodily issue per stirpes; if no bodily issue of said Helen Parke or Ethel Huff so dying should be surviving, then said share shall go to the survivor of said Helen Parke or Ethel Huff. Should neither said Helen Parke or Ethel Huff be surviving and no bodily issue of theirs surviving, then said part of the trust estate that would have been distributed to them shall be distributed to the [59] heirs of Edith Huff, one of the Trustors herein, according to the then existing statutes of succession of the State of California.

In Witness Whereof, said The First National Bank of Santa Ana, in its capacity as Trustee, has caused this in-

(Trustee's Exhibit No. 1.)

strument to be executed by its proper officer thereunto duly authorized, under its corporate seal, this 3rd day of July, 1928.

THE FIRST NATIONAL BANK OF SANTA ANA

By C. L. Pritchard Trust Officer.

(Seal) Trustee.

We, the undersigned, named in said Declaration of Trust No. 245 as Trustors, do hereby approve, ratify and confirm this Amendment to said Declaration of Trust No. 245, and we do hereby agree to be bound by all the terms thereof.

Dated this 3rd day of July, 1928.

W. A. Huff

Edith Huff

Trustors [60]

State of California,
County of Orange.—ss.

On this 3rd day of July, 1928, before me, E. Virginia Craig, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared C. L. Pritchard, known to me to be the Trust Officer of the corporation described in and that executed the within instrument, and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

E. Virginia Craig

Notary Public in and for
said County and State.

(Notarial Seal)

(Trustee's Exhibit No. 1.)

State of California,
County of Orange—ss.

On this 3rd day of July, 1928, before me, E. Virginia Craig a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared W. A. Huff and Edith Huff, known to me to be the persons described in and whose names are subscribed to the within instrument, and they acknowledged to me that they executed the same.

Witness my hand and official seal.

E. Virginia Craig
Notary Public in and for
said County and State.

(Notarial Seal) [61]

AMENDMENT TO DECLARATION OF TRUST
NO. 245, (W. A. Huff).

Know All Men by These Presents:

That Whereas, there was duly executed under date of May 10, 1927, a certain Declaration of Trust whereby The First National Bank of Santa Ana, Santa Ana, California, a national banking corporation, was named Trustee and W. A. Huff and Edith Huff, his wife, were named Trustors; and

Whereas, that said Declaration of Trust provides in paragraph twelve thereof that the Trustors, W. A. Huff and Edith Huff, reserved unto themselves the right to amend said trust in whole or in part; and

Whereas, the Trustors herein named wish to authorize the said Trustee to lease or mortgage said trust property for a longer period than the life of the trust;

(Trustee's Exhibit No. 1.)

Now, Therefore, the Trustee is given authority to mortgage or lease real property belonging to said trust estate during the time it manages said trust estate or any part thereof for a time beyond the existence of this trust.

In Witness Whereof, said The First National Bank of Santa Ana, in its capacity as Trustee, has caused this instrument to be executed by its proper officer thereunto duly authorized under its corporate seal, this 18th day of February, 1927.

THE FIRST NATIONAL BANK OF SANTA ANA.

By C. L. Pritchard

(seal) Trust Officer [62]

We, the undersigned, named in the foregoing Amendment to Declaration of Trust No. 245 (W. A. Huff), do hereby approve, ratify and confirm the same in all its parts, and we do hereby agree respectively to be bound by all the terms thereof.

Dated this 18th day of February, 1927.

W. A. Huff

Edith Huff

State of California,
County of Orange.—ss.

On this 18th day of February, 1927, before me, E. Virginia Craig, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared C. L. Pritchard, known to me to be the Trust Officer of the corporation described in and that executed the within instrument, and acknowledged that such corporation executed the same.

(Trustee's Exhibit No. 1.)

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

E. Virginia Craig
Notary Public in and for
said County and State.

(seal)

State of California,
County of Orange.—ss.

On this 18th day of February, 1927, before me, E. Virginia Craig, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared W. A. Huff and Edith Huff, his wife, known to me to be the persons described in and whose names are subscribed to the within instrument, and they acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

E. Virginia Craig
Notary Public in and for
said County and State.

(seal) [63]

Amendment to Declaration of Trust No. 245 W. A. Huff dated May 10th, 1927 Whereby The First National Bank of Santa Ana is named Trustee and W. A. Huff and Edith Huff are named as Trustors.

Whereas, Opening Paragraph of Original Paragraph 2 covering lines 9 to 18 inclusive page 2 of Original Trust Reads as follows:

(Trustee's Exhibit No. 1.)

That following the death of W. A. Huff, one of the Trustors herein named, providing there remain in the hands of the Trustee sufficient amounts of the Trust Estate to permit is so to do, there shall first be paid by the trustee the funeral expenses, expenses of last illness and just debts if the Trustor, W. A. Huff, and there shall then be distributed to Edith Huff, the other Trustor herein named, all the household furniture and fixtures, and automobiles, together with the personal effects of the said Trustor W. A. Huff, (Provided an assignment of same has been made to the Trustee and still remains in its Hands)

Whereas, this Amendment to Trust No. 245 made this date shall provide that Opening Paragraph of Original Paragraph 2 of said Trust No. 245 covering lines 9 to 10 inclusive page 2 of Original Trust shall become null and void and in place thereof, the following paragraph shall be known as Opening Paragraph of Original Paragraph 2 and shall be effective from this day and date.

That following death of W. A. Huff, one of the Trustors herein named, provided there remains in the hands of the Trustee sufficient amounts of the Trust Estate to permit it so to do, there shall first be paid by the Trustee the funeral expenses, expenses of last illness and just debts of the Trustor, W. A. Huff including the purchasing of section in Mausoleum in Fairhaven Cemetery, Orange Co. Calif. sufficient for remains of deceased Father and Mother of said W. A. Huff and for remains of both said Trustors, and to include from Trust Estate the cost of removing remains of deceased mother and father of said W. A. Huff from the present burial place to said Mausoleum, and to be retained by said Trustee herein named The sum of

(Trustee's Exhibit No. 1.)

Twenty Five Hundred Dollars in trust by said First National Bank of Santa Ana so long as any of the herein-after specifically named Beneficiaries shall live (It being the *beneficiaries* specifically named in trust No. 245) and after deaths of all specifically named *beneficiaries* said sum of Twenty Five Hundred shall be continued in trust with the Fairhaven Cemetery Assoc. or its successors. Sais Trust Fund to be known as The Huff Flower Fund Trust, and the net income therefrom shall be used in purchasing flowers to be placed on tombs of the said W. A. Huff and Edith Huff and deceased Mother and Father of said W. A. Huff from such time as their remains shall be placed in Mausoleum as above provided for. Flowers to be placed on each tomb of above named from such time as they are placed in said Mausoleum at least once a week, and if possible on Sunday morning of each week. And as soon as can be done the Trustee shall distribute to Edith Huff the other trustor herein named, all the household furniture, Automobiles, Clothing, Jewelry (including Diamonds) of the said Trustor W. A. Huff (Provided as assignment of same has been made to the Trustee and still remain in its hands).

In Witness Whereof, Said The First National Bank of Santa Ana, in its capacity as Trustee, has caused this instrument to be executed by its proper officer thereunto duly authorized under its corporate seal this 20th day of October 1928.

The First National Bank of Santa Ana,
By "C. L. Pritchard" Trust Officer.

(Corporate Seal) [64]

(Trustee's Exhibit No. 1.)

We, the undersigned, named in the foregoing Amendment to Declaration of Trust No. 245 (W. A. Huff), do hereby approve, ratify and confirm the same in all its parts, and we do hereby agree respectively to be bound by all the terms thereof. Dated this 20th day of October.

"W. A. Huff"

"Edith Huff" [65]

AMENDMENT TO DECLARATION OF TRUST
NO. 245, (W. A. HUFF).

Know All Men By These Presents:

That Whereas, there was duly executed under date of May 10, 1927, a certain Declaration of Trust whereby The First National Bank of Santa Ana, Santa Ana, California, a national banking corporation, was named Trustee and W. A. Huff and Edith Huff, his wife, were named Trustors; and

Whereas, on January 7, 1929, paragraph four was amended by Edith Huff, one of the Trustors named under Trust No. 245, in accordance with the provisions of said trust, giving her the right to amend said trust as to paragraph four; and

Whereas, This amendment is hereby made that in addition to the Amendment of paragraph four as made this 7th day of January, 1929, it is provided as a condition of the distribution of paragraph four as amended, control-

(Trustee's Exhibit No. 1.)

ling all other provisions thereof and anything to the contrary therein notwithstanding, that the trust as provided for under paragraph four as amended shall terminate and end immediately upon the deaths of said Edith Huff and all the specifically named Beneficiaries under paragraph four as amended, who shall be alive at the date of the execution of said trust, and at said time the Trustee shall distribute all the principal or corpus of that part of the trust estate as provided for distribution under paragraph four as amended this 7th day of January, 1929, in its hands to the persons entitled thereto as provided therein.

In Witness Whereof, said The First National Bank of Santa Ana, in its capacity as Trustee, has caused this instrument to be executed by its proper officer thereunto duly authorized, under its corporate seal, this 7th day of January, 1929.

THE FIRST NATIONAL BANK OF SANTA ANA.

By C. L. Pritchard, Trust Officer.

Trustee [66]

I, the undersigned, surviving Trustor, named in said Declaration of Trust No. 245, do hereby approve, ratify and confirm this Amendment to said Declaration of Trust No. 245 and I do hereby agree to be bound by all the terms thereof.

Dated this 7th day of January, 1929.

Edith Huff [67]

(Trustee's Exhibit No. 1.)

AMENDMENT TO DECLARATION OF TRUST
NO. 245, W. A. HUFF, DATED THE 10th DAY
OF MAY, 1927, WHEREIN THE FIRST NA-
TIONAL BANK OF SANTA ANA IS NAMED
TRUSTEE AND W. A. HUFF and EDITH
HUFF ARE NAMED TRUSTORS.

WHEREAS, paragraph four of said declaration of trust reads as follows:

“Following the death of said Edith Huff, one of the Trustors herein named, from that part of the trust estate referred to as “A” under paragraph three then remaining in the hands of the Trustee the Trustee shall pay her funeral expenses and expenses of last illness and legal debts, and thereafter there shall first be paid the sum of Five Thousand Dollars (\$5000) to the Christian Church of Santa Ana, California. The remainder of the trust estate held under “A” of paragraph three shall remain in the hands of the Trustee as long as Ella Whitted, sister of said Edith Huff, shall live, and as long thereafter until Jane Whitted, greatniece of said Edith Huff, has attained the age of twenty-one years. Should said Ella Whitted not live until said Janes Whitted has attained the age of twenty-one years, then said trust estate shall remain in the hands of the Trustee until said Jane Whitted has attained the age of twenty-one years, or should the said Ella Whitted die and the said Jane Whitted not live to attain the age of twenty-one years then the trust estate shall be held in trust until such time as the said Jane Whitted would have attained, the age of twenty-one years

(Trustee's Exhibit No. 1.)

should she have lived, provided that any of the herein specifically named Beneficiaries, who shall be alive at the creation of this trust, be living.

"The net income of the trust estate held under "A" of paragraph three shall be distributed as follows:

"First: To said Ella Whitted the sum of One Hundred Fifty Dollars (\$150) monthly during her life.

"Second: To Jack Whitted, Margaret Whitted, Milo Mitchell, Gladys Mitchell, and Eileen Beaty, greatnephews and greatnieces of the said Trustor, Edith Huff, the sum of Fifty Dollars (\$50.00) a month each, until the termination of this trust.

"Third: The sum of Fifty Dollars (\$50.00) a month of said income shall be distributed and accumulated by the Trustee in the following manner: Ten Dollars (\$10.00) thereof shall be used by the said Trustee towards the maintenance and education of Donald Whitted, son of Rex Whitted, nephew of the Trustor, Edith Huff, until he attains the age of eight years. Fifteen Dollars (\$15.00) a month shall be used by the said Trustee towards the maintenance and education of said Donald Whitted from the time he attains the age of eight years until he attains the age of twelve years. Twenty-five Dollars (\$25.00) a month shall be used by the said Trustee towards the maintenance and education of said Donald Whitted from the time he attains the age of twelve years [68] until he attains the age of sixteen years. Fifty Dollars (\$50.00) a month shall be used by the said

(Trustee's Exhibit No. 1.)

Trustee towards the maintenance and education of said Donald Whitted from the time he attains the age of sixteen years until he attains the age of twenty-one years, provided he attends a high school, college or university; if he does not attend a high school, college or university, said Fifty Dollars (\$50.00) a month shall be deposited in a savings account and the interest accumulated and paid to him when he attains the age of twenty-one years.

"The balance of the Fifty Dollars (\$50.00) a month as hereinbefore provided shall be deposited in a savings account and the income accumulated until said Donald Whitted attains the age of sixteen years when the sums so accumulated in a savings account, including the earnings thereon, shall be used towards the maintenance and education of said Donald Whitted, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sums are to be accumulated and paid to him when he attains the age of twenty-one years.

"Should said Donald Whitted not live to attain the age of twenty-one years but be survived by bodily issue, then the said amounts as hereinbefore provided to be paid to him or accumulated for him shall be distributed to his bodily issue per stirpes. Should he not live to attain the age of twenty-one years and not be survived by bodily issue, then the amounts hereinbefore provided to be paid to him or accumulated for him shall become a part of the net income of that part of the trust estate referred to as

Trustee's Exhibit No. 1.)

"A" of paragraph three and shall be distributed as hereinafter provided under subdivision sixth of this paragraph four.

"Fourth: The sum of Fifty Dollars (\$50.00) a month of the net income shall be distributed and accumulated by the said Trustee in the following manner: Twenty-five Dollars (\$25.00) a month thereof shall be used by the said Trustee towards the maintenance and education of Jane Whitted, great-niece of said Trustor, Edith Huff, until said Jane Whitted has attained the age of sixteen years; Fifty Dollars (\$50.00) a month shall be used by the Trustee towards the maintenance and education of said Jane Whitted from the time she attains the age of sixteen years until she attains the age of twenty-one years, provided she attends a high school, college or university; if she does not attend a high school, college or university, said Fifty Dollars (\$50.00) a month shall be deposited in a savings account and the interest accumulated and paid to her when she has attained the age of twenty-one years. The balance of the Fifty Dollars (\$50.00) a month as hereinbefore provided shall be deposited in a savings account for her benefit and the income accumulated until the said Jane Whitted attains the age of sixteen years when the sums so accumulated in a savings account, including the earnings thereon, shall be used towards the maintenance and education of said Jane Whitted, provided she attends a high school, college or university; if she does not attend a high school, college or university, said sums are to be accumulated and

(Trustee's Exhibit No. 1.)

paid to her when she [69] attains the age of twenty-one years.

"Should said Jane Whitted not live to attain the age of twenty-one years but be survived by bodily issue, then the said amounts as hereinbefore provided to be paid to her or accumulated for her shall be distributed to her bodily issue per stirpes. Should she not live to attain the age of twenty-one years and not be survived by bodily issue, then the amounts hereinbefore provided to be paid to her or accumulated for her shall become a part of the net income of that part of the trust estate referred to as "A" of paragraph three and shall be distributed as hereinafter provided under subdivision sixth of this paragraph four.

"Fifth: The sum of Fifty Dollars (\$50.00) a month *for* the net income shall be distributed and accumulated by the said Trustee in the following manner: Twenty-five Dollars (\$25.00) a month thereof shall be used by the said Trustee towards the maintenance and education of Billy Whitted, great-nephew of the said Trustor, Edith Huff, until said Billy Whitted has attained the age of sixteen years; Fifty Dollars (\$50.00) a month shall be used by the Trustee towards the maintenance and education of said Billy Whitted from the time he attains the age of sixteen years until he attains the age of twenty-one years, provided he attends a high school, college or university, if he does not attend a high school, college or university, said Fifty Dollars (\$50.00) a month shall be deposited in a savings account and

(Trustee's Exhibit No. 1.)

the interest accumulated and paid to him when he has attained the age of twenty-one years. The balance of the Fifty Dollars (\$50.00) a month as hereinbefore provided shall be deposited in a savings account for his benefit and the income accumulated until the said Billy Whitted attains the age of sixteen years when the sums so accumulated in a savings account, including the earnings thereon, shall be used towards the maintenance and education of said Billy Whitted, provided he attends a high school, college or university; if he does not attend a high school, college or university, said sums are to be accumulated and paid to him when he attains the age of twenty-one years.

“Should said Billy Whitted not live to attain the age of twenty-one years but be survived by bodily issue, then the said amounts as hereinbefore provided to be paid to him or accumulated for him shall be distributed to his bodily issue per stirpes. Should he not live to attain the age of twenty-one years and not be survived by bodily issue, then the amounts hereinbefore provided to be paid to him or accumulated for him shall become a part of the net income of that part of the trust estate referred to as “A” of paragraph three and shall be distributed as hereinafter provided under subdivision sixth of this paragraph four.

“Sixth: The remainder of the net income of that part of the trust estate referred to as “A” of paragraph three shall be distributed by the said Trustee equally to the following nieces and nephews of the

(Trustee's Exhibit No. 1.)

said Trustor, Edith Huff: Rex Whitted, Roscoe Whitted, Louie Beaty, Bernice Lutz, Ralph Sentney, and Mrs. Stella Mitchell: [70] or in the event of the death of any of them, his or her share shall go to his or her bodily issue per stirpes, and if no bodily issue to the other Beneficiaries named in this subdivision sixth or to their bodily issue per stirpes.

"Following the death of the said Ella Whitted, sister of the Trustor, Edith Huff, and thereafter at the times hereinbefore set forth for the termination of said portion of this trust, the trust estate then remaining in the hands of the Trustee shall be distributed by the said Trustee two-thirds thereof equally to the following nieces and nephews of the said Trustor, Edith Huff: Rex Whitted, Roscoe Whitted, Louis Beaty, Bernice Lutz, Ralph Sentney, and Mrs. Stella Mitchell; and one-third thereof equally to the following great-nieces and great-nephews of the said Trustor, Edith Huff: Jack Whitted, Margaret Whitted, Milo Mitchell, Gladys Mitchell, Eileen Beaty, Billy Whitted, Jane Whitted, and Donald Whitted. Provided, however, that that part to be distributed to said Donald Whitted shall not be distributed to him unless he has attained the age of twenty-five years. If he has not attained the age of twenty-five years, same shall be held in trust and the income distributed to him monthly until he has attained the age of twenty-five years when the principal held for him shall be distributed to him.

"Should any of the hereinbefore named Beneficiaries, who are to receive income or principal from

(Trustee's Exhibit No. 1.)

that part of the trust estate referred to as "A" under paragraph three, not be living, or die during the life of this trust and be survived by bodily issue, then said income or principal shall be paid to said bodily issue per stirpes. Should any of said Beneficiaries not be living or die during the life of this trust and not be survived by bodily issue, then the income or principal that would have been distributed to them shall be distributed as provided for the distribution of income in subdivision sixth of this paragraph four."; and

Whereas, in said declaration of trust it is provided that in the event of the death of either of trustors, the surviving trustor reserves the right to amend or alter said declaration of trust in so far as the same shall relate to the distribution of one-half of the trust estate therein provided to be distributed to the family of said surviving trustor, by changing the name of the beneficiaries or changing the amounts provided for any beneficiary; and

Whereas, said W. A. Huff, one of said trustors, died in the county of Orange, state of California, on the nineteenth day of November, 1928, and Edith Huff, said surviving trustor under said declaration of trust, desires now to avail herself of [71] said foregoing provision and amend and alter said declaration of trust in so far as the same relates to the distribution of the one-half of said trust estate therein provided to be distributed to the family of said Edith Huff, and to change certain beneficiaries therein named and the amounts which certain beneficiaries shall receive thereunder, and to alter and

(Trustee's Exhibit No. 1.)

amend said declaration of trust so as to omit any provision for certain persons or beneficiaries named therein who are by said declaration of trust entitled to receive certain amounts thereunder, as said declaration of trust is now written, so far as said one-half interest of said trust estate is concerned.

Now, Therefore, paragraph four of said declaration of trust No. 245, is hereby stricken out in its entirety and each and every provision thereof shall become and is hereby null and void, and in lieu thereof and substituted therefor, effective from this day and date, shall be the following:

Paragraph four:

"Following the death of said Edith Huff, one of the trustors herein named, from that part of the trust estate referred to as "A" under paragraph three then remaining in the hands of the trustee, the trustee shall pay her funeral expenses and expenses of last illness and legal debts, and thereafter there shall first be paid the following sums to the respective persons mentioned below, namely:

"First: To the Christian Church of Santa Ana, California, the sum of five thousand dollars (\$5000.00).

"Second: To Stella Mitchell, the sum of five thousand dollars (\$5000.00). Should said Stella Mitchell be not surviving or die before the death of said Edith Huff, then said sum of five thousand dollars (\$5000.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four. [72]

(Trustee's Exhibit No. 1.)

"Third: To Roscoe Whitted, the sum of five thousand dollars (\$5000.00). Should said Roscoe Whitted be not surviving or die before the death of said Edith Huff, then said sum of five thousand dollars (\$5000.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Fourth: To Louie Beaty, the sum of five thousand dollars (\$5000.00). Should said Louie Beaty be not surviving or die before the death of said Edith Huff, said sum of five thousand dollars (\$5000.00) shall be paid to Eileen Beaty, daughter of said Louie Beaty. If, however, neither said Louie Beaty nor said Eileen Beaty be surviving at the time of the death of said Edith Huff, then said sum of five thousand dollars (\$5000.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Fifth: To Eileen Beaty, the sum of ten thousand dollars (\$10,000.00). Should said Eileen Beaty be not surviving or die before the death of said Edith Huff, then said sum of ten thousand dollars (\$10,000.00) shall be paid to Louie Beaty, the father of said Eileen Beaty. If, however, neither said Eileen Beaty nor said Louie Beaty be surviving at the death of said Edith Huff, then said sum of ten thousand dollars (\$10,000.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Sixth: To Margaret Whitted, the sum of five thousand dollars (\$5000.00). Should said Margaret Whitted

(Trustee's Exhibit No. 1.)

be not surviving or die before the death of said Edith Huff, but be survived by bodily issue, then said sum of five thousand dollars (\$5000.00) shall be paid and distributed to said bodily per stirpes. Should said Margaret Whitted, however, not be surviving and not [73] be survived by bodily issue, then said sum of five thousand dollars (\$5000.00) shall become a part of the residue of the trust estate and be distributed as hereinafter provided in this paragraph number four.

“After payment of the funeral expenses, expenses of last illness and legal debts of the trustor, Edith Huff, together with the payments of the sums provided in subdivisions “First” to “Sixth,” both inclusive, the balance of said one-half of the entire trust estate then remaining in the hands of the trustee shall be distributed, disposed of and handled in the following manner:

“An equal one-third share of said portion of the trust estate then remaining shall be distributed to Bernice Lutz, niece of said trustor, Edith Huff. Should said Bernice Lutz be not surviving at the death of said Edith Huff, but be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to said bodily issue per stirpes. Should said Bernice Lutz not be surviving and not be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to Ralph Sentney, brother of said Bernice Lutz, and should said Ralph Sentney be not surviving at said time, then one-fourth of said portion of said estate so to be distributed to Bernice Lutz shall be distributed to William Arthur Lutz, the husband of said Bernice Lutz, and the

(Trustee's Exhibit No. 1.)

balance of said portion of said estate shall become a part of the trust estate and be held in trust for the benefit of Rex Whitted, Ella Whitted, Margaret Whitted, Jane Whitted, Billy Whitted, Jack Whitted, and Donald Whitted for the time and for the purposes hereinafter provided. Should said William Arthur Lutz be not surviving at said time, then said one-fourth of said estate shall become a part of the trust estate [74] and held in trust as hereinafter provided for the benefit of said Rex Whitted, Ella Whitted, Margaret Whitted, Jane Whitted, Billy Whitted, Jack Whitted, and Donald Whitted.

“An equal one-third share of said portion of the trust estate then remaining shall be distributed to Ralph Sentney, nephew of said Edith Huff. Should Ralph Sentney be not surviving at the date of death of said Edith Huff but be survived by bodily issue, then that portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the bodily issue of said Ralph Sentney per stirpes. If, however, said Ralph Sentney be not surviving and not be survived by bodily issue, then said portion of said estate shall be distributed to Bernice Lutz, the sister of said Ralph Sentney, and should said Bernice Lutz be not surviving at said time, and should said Ralph Sentney be not survived by bodily issue, then one-half of said portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the wife of said Ralph Sentney, if he is married, and said wife is living with him and no proceedings for divorce or separate maintenance be pending between them at the time of the death of said Ralph Sentney, and the other one-half of said estate shall become a part of the residue of the trust

(Trustee's Exhibit No. 1.)

estate to be held in trust for the benefit of Rex Whitted, Ella Whitted, Margaret Whitted, Jane Whitted, Jack Whitted, Billy Whitted, and Donald Whitted, for the period of time and for the purposes hereinafter provided. Should said Ralph Sentney be not survived by a wife, or should said wife not be living with him or proceedings for divorce or separate maintenance be pending at the time of his death, then said one-half of said estate to which said wife [75] would otherwise be entitled shall be distributed to Eileen Beaty, or if Eileen Beaty be not surviving, then to Louie Beaty, father of Eileen Beaty, and should said Louie Beaty be then not surviving, then said portion of said estate shall become a part of the residue of the trust estate and held in trust for the benefit of said Rex Whitted, Ella Whitted, Margaret Whitted, Jane Whitted, Jack Whitted, Billy Whitted, and Donald Whitted for the period of time and for the purposes hereinafter provided.

“An equal one-third share of said portion of the trust estate to remain in trust during the life of Ella Whitted and thereafter so long as Rex Whitted shall live and until Donald Whitted attains the age of eighteen (18) years, or if said Donald Whitted should die before attaining such age, then until such a time until said Donald Whitted would have attained the age of eighteen (18) years had he lived, and the income from this portion of said estate so held in trust, provided said income will permit, shall be divided as follows:

“(a) One hundred dollars (\$100.00) per month of said income shall be paid to Rex Whitted for his personal use during his life. Should the said Rex Whitted be not

(Trustee's Exhibit No. 1.)

surviving or die before the death of said Edith Huff, then Katherine Whitted, the wife of said Rex Whitted, shall be paid said sum of one hundred dollars (\$100.00) per month during her life. Should the said Katherine Whitted be not surviving or die before the death of said Edith Huff, then the said one hundred dollars (\$100.00) per month shall be divided and paid to the bodily issue of said Rex Whitted living at the date of execution of this declaration of trust, per stirpes, provided they have attained the age of [76] twenty-one (21) years. Any of said bodily issue of said Rex Whitted who have not, at the time of death of said Katherine Whitted, attained the age of twenty-one (21) years, then that part of the income which would have been distributed to them or any of them, should they or any of them have attained the age of twenty-one (21) years, shall be deposited in a savings account for the benefit of said bodily issue, respectively, who have not so attained the age of twenty-one (21) years, and the income so accumulated thereon shall be distributed to said bodily issue at such time as said bodily issue attain the age of twenty-one (21) years, respectively. Should any of said bodily issue of said Rex Whitted die during the time said bodily issue shall be entitled to receive his or their share of said one hundred dollars (\$100.00) per month, then the interest to which said bodily issue so deceased would be entitled shall be paid to and be divided equally among the survivor or survivors of said bodily issue of said Rex Whitted, who may be living upon the execution of this declaration of trust. Upon the death of said Rex Whitted and the said Katherine Whitted, his said wife, and upon the death of all of the bodily issue of said Rex Whitted living at the

(Trustee's Exhibit No. 1.)

date of the execution of this declaration of trust, then this trust, in so far as it relates to one-third share of said one-half portion of said estate so held in trust, shall ipso facto terminate and the said estate with accumulated income thereon shall be distributed to the persons who may be the then surviving heirs at law of said trustor, Edith Huff, according to the laws of succession of the state of California then in effect, such persons to be ascertained as of the date of the termination of this trust effecting said one-third portion of said one-half of the trust estate so held in trust.

“(b) The sum of one hundred fifty dollars (\$150.00) of said income shall be paid to Ella Whitted so long as said [77] Ella Whitted shall live, said sum to be paid monthly. Should said Ella Whitted be not surviving or die before the death of said Edith Huff or at any time after the death of said Edith Huff, at which time she would be entitled to receive said sum of one hundred fifty dollars (\$150.00) per month, the said sum shall be divided and paid one-third to Rex Whitted, the son of said Ella Whitted, and two-thirds thereof divided among and paid to Margaret Whitted, Jane Whitted, Billy Whitted, Jack Whitted and Donald Whitted, grandchildren of said Ella Whitted and the bodily issue of Rex Whitted; provided, however, if, at such time, any of said bodily issue shall not have attained the age of twenty-one (21) years, the said income payable to those of them who have not so attained such age shall be deposited in a savings account to be paid to said bodily issue as and when they reach the age of twenty-one (21) years, respectively. Upon the death of any of said bodily issue of said Rex

(Trustee's Exhibit No. 1.)

Whitted at any time they are entitled to receive said share of said sum of one hundred fifty dollars (\$150.00) per month by reason of the death of said Ella Whitted, the interest or amount to which such bodily issue so deceased would be entitled to take, had such bodily issue lived, shall be divided equally among and paid to the survivor or survivors of said bodily issue, and the interest or amount any of said bodily issue who has not attained the age of twenty-one (21) years shall be deposited in said savings account to be distributed at the time said bodily issue shall attain said age of twenty-one (21) years, respectively.

“(c) The balance of the income of said estate then remaining in the hands of said trustee after the payment of said sums of one hundred dollars (\$100.00) and one hundred fifty dollars (\$150.00) monthly, as just above provided, shall be paid to and divided equally among the bodily issue of Rex Whitted, [78] namely: Margaret Whitted, Jane Whitted, Billy Whitted, Jack Whitted and Donald Whitted. Should any of said bodily issue be not surviving or die before the death of said Edith Huff, but be survived by bodily issue then the amount provided to be paid to or accumulated for such bodily issue of said Rex Whitted shall be disbursed to the bodily issue of such deceased bodily issue of said Rex Whitted per stirpes. If, however, any one or more of said bodily issue of said Rex Whitted be not surviving or die before the death of said Edith Huff and not be survived by bodily issue of said deceased bodily issue of said Rex Whitted, then the interest or amount to be paid to any of the bodily issue of said Rex Whitted so deceased, shall be divided equally among and be paid to the survivor or

(Trustee's Exhibit No. 1.)

survivors of said bodily issue of said Rex Whitted, and upon the death of all of said bodily issue of said Rex Whitted this trust, in so far as it relates to said one-third share of said one-half part thereof, shall terminate forthwith and the trust estate then remaining in the hands of said trustee shall be distributed and such distribution shall be made in the following manner: the bodily issue of any of the deceased bodily issue of said Rex Whitted shall receive the estate and interest which said deceased bodily issue of said Rex Whitted would be entitled to receive had he or she lived, per stirpes; and the balance then remaining shall be distributed to the persons who may be the then surviving heirs at law of said Edith Huff according to the law of succession of the state of California then in effect, such persons to be ascertained at the date of the termination of this portion of said trust.

“Should any of said bodily issue of said Rex Whitted not attain the age of twenty-one (21) years at the date of the death of said Edith Huff or at the time any of them are entitled to receive said sums above provided to be so divided among [79] them, then the same shall be deposited in a savings account to be disbursed to said bodily issue when they attain the age of twenty-one (21) years, respectively, except that as hereinafter provided certain sums may be used for maintenance and education until said bodily issue attain said age of twenty-one (21) years.

“From the said above income to be paid into said savings account, as above provided, for said Donald Whitted, during the time and until said Donald Whitted shall

(Trustee's Exhibit No. 1.)

attain the age of twenty-one (21) years, there shall be set aside the sum of fifty dollars (\$50.00) per month, which said sum shall be distributed and accumulated by said trustee in the following manner: ten dollars (\$10.00) per month thereof shall be used by said trustee toward the support and education of said Donald Whitted until he attains the age of eight (8) years; fifteen dollars (\$15.00) per month of said sum shall be used by said trustee toward the support and education of said Donald Whitted from the time he attains the age of eight (8) years until he attains the age of twelve (12) years; twenty-five dollars (\$25.00) per month of said sum shall be used by said trustee toward the maintenance and education of said Donald Whitted from the time he attains the age of twelve (12) years until he attains the age of sixteen (16) years; fifty dollars (\$50.00) per month shall be used by the said trustee toward the maintenance and education of said Donald Whitted from the time he attains the age of sixteen (16) years until he attains the age of twenty-one (21) years, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sum of fifty dollars (\$50.00) per month shall be held, and the interest accumulated thereon, in said savings account to be distributed and paid to said Donald Whitted when he attains the age of twenty-one (21) years. The balance of said fifty dollars [80] (\$50.00), as hereinbefore provided, shall be held and maintained in said savings account and the income accumulated thereon until said Donald Whitted attains the age of sixteen (16) years when said sums so accumulated in said savings account, including the earnings thereon, shall be used toward the maintenance and

(Trustee's Exhibit No. 1.)

education of said Donald Whitted, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sums are to be accumulated and paid to him when he attains the age of twenty-one (21) years.

"From said income provided above to be deposited in said savings account to the credit and for the benefit of Jane Whitted, greatniece of said trustor, Edith Huff, there shall be set aside the sum of fifty dollars (\$50.00) per month, to be distributed and accumulated by the said trustee in the following manner: twenty-five dollars (\$25.00) per month thereof to be used by the said trustee toward the maintenance and education of Jane Whitted until said Jane Whitted has attained the age of sixteen (16) years; fifty dollars (\$50.00) per month shall be used by the trustee toward the maintenance and education of said Jane Whitted from the time she attains the age of sixteen (16) years until she attains the age of twenty-one (21) years, provided she attends a high school, college or university. If she does not attend a high school, college or university, said sum of fifty dollars (\$50.00) per month shall be held and maintained in said savings account to be paid to said Jane Whitted, with the interest accumulated thereon, when she has attained the age of twenty-one (21) years. The balance of said sum of fifty dollars (\$50.00), as hereinbefore provided, shall be held in said savings account and the income accumulated thereon until said Jane Whitted attains the age of sixteen (16) years when the sums so accumulated in said savings account, including the earnings thereon, shall be used toward the maintenance and education of said Jane Whitted, provided she [81] attends a high school, college or uni-

(Trustee's Exhibit No. 1.)

versity. If she does not attend a high school, college or university, said sums are to be accumulated and paid to her, with the income accumulated thereon, when she attains said age of twenty-one (21) years.

"From the said above income hereinbefore provided to be held in said savings account to the credit and for the benefit of Billy Whitted, greatnephew of said trustor, Edith Huff, until said Billy Whitted attains the age of twenty-one (21) years, there shall be set aside the sum of fifty dollars (\$50.00) per month, to be distributed to and accumulated for said Billy Whitted in the following manner: twenty-five dollars (\$25.00) per month thereof to be used by said trustee toward the maintenance and education of said Billy Whitted until he has attained the age of sixteen (16) years; fifty dollars (\$50.00) per month of said sum to be used by the trustee toward the maintenance and education of said Billy Whitted from the time he attains the age of sixteen (16) years until he attains the age of twenty-one (21) years, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sum of fifty dollars (\$50.00) per month shall be held and maintained in said savings account, to be paid to said Billy Whitted, together with the income accumulated thereon when he has attained the age of twenty-one (21) years. The balance of said fifty dollars (\$50.00) per month, as hereinbefore provided, shall be accumulated in said savings account, together with the income earned thereon, for the

(Trustee's Exhibit No. 1.)

benefit of said Billy Whitted until he attains the age of sixteen (16) years when the sums so accumulated in said savings account, including the earnings thereon, shall be used toward the maintenance and education of said Billy Whitted, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sums shall be held in said savings account, to be paid to said [82] Billy Whitted, together with income accumulated thereon, when he attains the age of twenty-one (21) years."

In Witness Whereof, The First National Bank of Santa Ana, in its capacity as trustee, has caused this instrument to be executed by its proper officer thereunto duly authorized, under its corporate seal, this day of January, 1929.

THE FIRST NATIONAL BANK OF SANTA ANA

By, trust officer.
Trustee.

Edith Huff, the undersigned, named in said declaration of trust No. 245 as one of the trustors thereunder, does hereby approve, ratify and confirm this amendment to said declaration of trust No. 245, and does hereby agree to be bound by all of the terms thereof.

Dated this day of January, 1929.

.....
(Edith Huff)

Trustor. [83]

(Trustee's Exhibit No. 1.)

AMENDMENT TO DECLARATION OF TRUST
NO. 245. (W. A. Huff)

Know All Men By These Presents:

That Whereas, there was duly executed under date of May 10th, 1927, a certain Declaration of Trust whereby The First National Bank of Santa Ana, Santa Ana, California, a national banking corporation, was named Trustee and W. A. Huff and Edith Huff were named Trustors; and

Whereas, in said Declaration of Trust it is provided that in the event of the death of either of the Trustors the surviving Trustor reserves the right to amend or alter said Declaration of Trust insofar as the same shall relate to the distribution of one-half of the trust estate therein provided to be distributed to the family of the surviving Trustor by changing the name of the Beneficiaries or changing the amounts provided for any Beneficiary, and

Whereas, said W. A. Huff, one of the Trustors, died in the County of Orange, State of California, on the 19th day of November, 1928, and Edith Huff, said surviving Trustor under said Declaration of Trust, availed herself of the said foregoing provision and amended said trust as to the division of said one-half on the 7th day of January, 1929, by executing two instruments in making amendment thereof, both acknowledged on the 7th day of January, 1929;

Now, therefore, paragraph four of said Declaration of Trust No. 245 as amended on January 7th, 1929, is hereby stricken out in its entirety and each and every pro-

(Trustee's Exhibit No. 1.)

vision shall become and is hereby null and void, and in lieu thereof and substituted therefor, effective from this day and date, shall be the following:

Paragraph four:

"Following the death of said Edith Huff, one of the trustors herein name, from that part of the trust estate referred to as [84] "A" under paragraph three then remaining in the hands of the trustee, the trustee shall pay her funeral expenses and expenses of last illness and legal debts, and thereafter there shall first be paid the following sums to the respective persons mentioned below, namely:

"First: To the Christian Church of Santa Ana, California, the sum of twenty-five hundred dollars (\$2500.00).

"Second: To Stella Mitchell, niece of said Trustor, the sum of twenty-five hundred dollars (\$2500.00). Should said Stella Mitchell be not surviving or die before the death of said Edith Huff, then said sum of twenty-five hundred dollars (\$2500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Third: To Milo Mitchell, grand-nephew of said Trustor, the sum of twenty-five hundred dollars (\$2500.00). Should said Milo Mitchell be not surviving or die before the death of said Edith Huff, then said sum of twenty-five hundred dollars (\$2500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Fourth: To Gladys Mitchell, grand-niece of said Trustor, the sum of Twenty-five hundred dollars

(Trustee's Exhibit No. 1.)

(\$2500.00). Should said Gladys Mitchell be not surviving or die before the death of said Edith Huff, then said sum of twenty-five hundred dollars (\$2500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Fifth: To Louie Beaty, nephew of said Trustor, the sum of twenty-five hundred dollars (\$2500.00). Should said Louie Beaty be not surviving or die before the death of said Edith Huff, then said sum of twenty-five hundred dollars (\$2500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Sixth: To Eileen Beaty, great-niece of said Trustor, the sum [85] of five hundred dollars (\$500.00). Should said Eileen Beaty be not surviving or die before the death of Edith Huff, then said sum of five hundred dollars (\$500.00) shall be paid to Louie Beaty, the father of said Eileen Beaty. If, however, neither said Eileen Beaty nor said Louie Beaty be surviving at the death of said Edith Huff, then said sum of five hundred dollars (\$500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Seventh: To Margaret Joanna Donahue, great-great-niece of the said Trustor, Edith Huff, and a daughter of Margaret Whitted Donahue, deceased, the sum of Fifteen thousand dollars (\$15,000.00), provided the said Margaret Joanna Donahue has attained the age of twenty-seven years. If, however, said Margaret Joanna Donahue has not attained the age of twenty-seven years at the

(Trustee's Exhibit No. 1.)

time of the death of the said Trustor, Edith Huff, but has attained the age of twenty-one years, then one-half of the said Fifteen thousand dollars (\$15,000.00) shall be distributed to the said Margaret Joanna Donahue, and one-half shall remain in trust with the said Trustee and the income available therefrom shall be distributed to said Margaret Joanna Donahue until she has attained the age of twenty-seven years, when the said trust estate created for her benefit as provided herein then remaining in the hands of the Trustee, together with any accumulation of income therefrom, shall be distributed to the said Margaret Joanna Donahue, and should the said Margaret Joanna Donahue not have attained the age of twenty-one years at the time of the death of said Trustor, Edith Huff, then the said fifteen thousand dollars (\$15,000.00) shall be held in trust by said Trustee and the income available for distribution shall be distributed to Bernice Lutz, niece of the Trustor, for the support and education of said Margaret Joanna Donahue, the said Bernice Lutz, insofar as this trust fund is [86] concerned, to be known as the guardian of Margaret Joanna Donahue, and the amount needed for the support and education of the said Margaret Joanna Donahue is to be determined solely by said Bernice Lutz. Any income in excess of the actual amount designated by the said Bernice Lutz for the support and education of said Margaret Joanna Donahue is to become a part of the principal of the said trust fund created hereunder for her benefit. Should the said Margaret Joanna Donahue not survive the said Trustor, Edith Huff, then the said sum of fifteen thousand dollars (\$15,000.00) shall be cancelled as to Margaret Joanna Donahue and is to become a part of the residue of the trust estate and

(Trustee's Exhibit No. 1.)

distributed as hereinafter provided in this paragraph number four. Should said Margaret Joanna Donahue survive the Trustor, Edith Huff, but die before the termination of this trust fund created for her benefit, 50% of the amount remaining in trust for her benefit at the time of her death shall be distributed to her Father, John J. Donahue, and the balance is to become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four. Should the said John J. Donahue not be surviving at the death of said Margaret Joanna Donahue, then the 50% of the amount remaining in the trust for the benefit of Margaret Joanna Donahue shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph four.

“After payment of the funeral expenses, expenses of last illness and legal debts of the trustor, Edith Huff, together with the payments of the sums provided in subdivisions “First” to “Seventh,” both inclusive, the balance
trust

of said one-half of the entire / estate then remaining in the hands of the trustee shall be distributed, disposed of and handled in the following manner :

“An equal one-third share of said portion of the trust estate then remaining shall be distributed to Bernice Lutz, niece of said trustor, Edith Huff. Should said Bernice Lutz be not surviving [87] at the death of said Edith Huff, but be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to said bodily issue per stirpes. Should said Bernice Lutz not be surviving and not be survived

(Trustee's Exhibit No. 1.)

by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to Ralph Sentney, brother of said Bernice Lutz, and should said Ralph Sentney be not surviving at said time, then one-fourth of said portion of said estate so to be distributed to Bernice Lutz shall be distributed to William Arthur Lutz, the husband of said Bernice Lutz, and the balance of said portion of said estate shall become a part of the trust estate and be held in trust for the benefit of Rex Whitted, nephew, Ella Whitted, sister, Jane Whitted, Billy Whitted, Jack Whitted, and Donald Whitted, great-nieces and nephews of said Trustor, for the time and for the purposes hereinafter provided. Should said William Arthur Lutz be not surviving at said time, then said one-fourth of said estate shall become a part of the trust estate and held in trust as hereinafter provided for the benefit of said Rex Whitted, Ella Whitted, Jane Whitted, Billy Whitted, Jack Whitted, and Donald Whitted.

"An equal one-third share of said portion of the trust estate then remaining shall be distributed to Ralph Sentney, nephews of said Edith Huff. Should Ralph Sentney be not surviving at the date of death of said Edith Huff but be survived by bodily issue, then that portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the bodily issue of said Ralph Sentney per stirpes. If, however, said Ralph Sentney be not surviving and not be survived by bodily issue, then said portion of said estate shall be distributed to Bernice Lutz, the sister of said Ralph Sentney, and should said Bernice Lutz be not surviving at said time, and should said Ralph Sentney be not survived by bodily issue, then one-half of

(Trustee's Exhibit No. 1.)

said portion of said estate so to be [88] distributed to said Ralph Sentney shall be distributed to the wife of said Ralph Sentney, if he is married, and said wife is living with him and no proceedings for divorce or separate maintenance be pending between them at the time of the death of said Ralph Sentney, and the other one-half of said estate shall become a part of the residue of the trust estate to be held in trust for the benefit of Rex Whitted, nephew, Ella Whitted, sister, Jane Whitted, Jack Whitted, Billy Whitted, and Donald Whitted, great-niece and nephews of said Trustor, for the period of time and for the purposes hereinafter provided. Should said Ralph Sentney be not survived by a wife, or should said wife not be living with him or proceedings for divorce or separate maintenance be pending at the time of his death, then said one-half of said estate to which said wife would otherwise be entitled shall be distributed to Margaret Joanna Donahue, if the said Margaret Joanna Donahue has attained the age of twenty-seven years at the death of said Trustor, Edith Huff. If the said Margaret Joanna Donahue has not attained the age of twenty-seven years, then said one-half of said estate to which said wife would otherwise be entitled shall become a part of the trust estate created for Margaret Joanna Donahue under Subdivision Seven of this paragraph four, and should the said Margaret Joanna Donahue not be surviving then said portion of said trust estate shall become a part of the residue of the trust estate and held in trust for the benefit of said Rex Whitted, Ella Whitted, Jane Whitted, Jack Whitted, Billy Whitted, and Donald Whitted for the period of time and for the purposes hereinafter provided.

(Trustee's Exhibit No. 1.)

“An equal one-third share of said portion of the trust estate to remain in trust during the life of Ella Whitted, sister of said Trustor, and thereafter so long as Rex Whitted, nephew of said Trustor, shall live and until Donald Whitted, great-nephew of said Trustor, attains the age of eighteen (18) years, or if said Donald Whitted should die before attaining such age, then until such a time until said Donald Whitted would have attained the age of eighteen (18) years had he lived, and the income from this portion of said estate so held in trust, provided said income [89] will permit, shall be divided as follows:

“(a) One hundred dollars (\$100.00) per month of said income shall be paid to Rex Whitted, nephew of said Trustor, for his personal use during his life. Should the said Rex Whitted be not surviving or die before the death of said Edith Huff, then Katherine Whitted, the wife of said Rex Whitted, shall be paid said sum of one hundred dollars (\$100.00) per month during her life. Should the said Katherine Whitted be not surviving or die before the death of said Edith Huff, then the said one hundred dollars (\$100.00) per month shall be divided and paid to the bodily issue of said Rex Whitted living at the date of execution of this declaration of trust, per stirpes, provided they have attained the age of twenty-one years. Any of said bodily issue of said Rex Whitted who have not, at the time of death of said Katherine Whitted, attained the age of twenty-one (21) years, then that part of the income which would have been distributed to them or any of them, should they or any of them have attained the age of twenty-one (21) years,

(Trustee's Exhibit No. 1.)

shall be deposited in a savings account for the benefit of said bodily issue, respectively, who have not so attained the age of twenty-one (21) years, and the income so accumulated thereon shall be distributed to said bodily issue at such time as said bodily issue attain the age of twenty-one (21) years, respectively. Should any of said bodily issue of said Rex Whitted die during the time said bodily issue shall be entitled to receive his or their share of said one hundred dollars (\$100.00) per month, then the interest to which said bodily issue so deceased would be entitled shall be paid to and be divided equally among the survivor or survivors of said bodily issue of said Rex Whitted, who may be living upon the execution of this declaration of trust. Upon the death of said Rex Whitted and the said Katherine Whitted, his said wife, and upon the death of all of the bodily issue of said Rex Whitted [90] living at the date of the execution of this declaration of trust, then this trust, in so far as it relates to one-third share of said one-half portion of said estate so held in trust, shall ipso facto terminate and the said estate with accumulated income thereon shall be distributed to the persons who may be the then surviving heirs at law of said trustor, Edith Huff, according to the laws of succession of the State of California then in effect, such persons to be ascertained as of the date of the termination of this trust effecting said one-third portion of said one-half of the trust estate so held in trust.

“(b) The sum of one hundred fifty dollars (\$150.00) of said income shall be paid to Ella Whitted so long as said Ella Whitted shall live, said sum to be paid monthly. Should said Ella Whitted be not surviving or die before the death of said Edith Huff or at any time after the

(Trustee's Exhibit No. 1.)

death of said Edith Huff, at which time she would be entitled to receive said sum of one hundred fifty dollars (\$150.00) per month, the said sum shall be divided and paid one-third to Rex Whitted, the son of said Ella Whitted, and two-thirds thereof divided among and paid to Jane Whitted, Billy Whitted, Jack Whitted and Donald Whitted, grandchildren of said Ella Whitted and the bodily issue of Rex Whitted; provided, however, if, at such time, any of said bodily issue shall not have attained the age of twenty-one (21) years, the said income payable to those of them who have not so attained such age shall be deposited in a savings account to be paid to said bodily issue as and when they reach the age of twenty-one (21) years, respectively. Upon the death of any of said bodily issue of said Rex Whitted at any time they are entitled to receive said share of said sum of one hundred fifty dollars (\$150.00) per month by reason of the death of said Ella Whitted, the interest or amount to which such bodily issue so deceased would be entitled to take, had such bodily issue lived, shall be divided equally among and [91] paid to the survivor or survivors of said bodily issue, and the interest or amount any of said bodily issue who has not attained the age of twenty-one (21) years shall be deposited in said savings account to be distributed at the time said bodily issue shall attain said age of twenty-one (21) years, respectively.

“(c) The balance of the income of said estate then remaining in the hands of said trustee after the payment of said sums of one hundred dollars (\$100.00) and one hundred fifty dollars (\$150.00) monthly, as just above provided, shall be paid to and divided equally among the bodily issue of Rex Whitted, namely: Jane Whitted, Billy

(Trustee's Exhibit No. 1.)

Whitted, Jack Whitted and Donald Whitted. Should any of said bodily issue be not surviving or die before the death of said Edith Huff, but be survived by bodily issue then the amount provided to be paid to or accumulated
issue

for such bodily / of said Rex Whitted shall be disbursed to the bodily issue of such deceased bodily issue of said Rex Whitted per stirpes. If, however, any one or more of said bodily issue of said Rex Whitted be not surviving or die before the death of said Edith Huff and not be survived by bodily issue of said deceased bodily issue of said Rex Whitted, then the interest or amount to be paid to any of the bodily issue of said Rex Whitted so deceased, shall be divided equally among and be paid to the survivor or survivors of said bodily issue of said Rex Whitted, and upon the death of all of said bodily issue of said Rex Whitted this trust, in so far as it relates to said one-third share of said one-half part thereof, shall terminate forthwith and the trust estate then remaining in the hands of said trustee shall be distributed and such distribution shall be made in the following manner: the bodily issue of any of the deceased bodily issue of said Rex Whitted shall receive the estate and interest which said deceased bodily issue of said Rex Whitted would be entitled to receive had he or she lived, per stirpes; and the balance then [92] remaining shall be distributed to the persons who may be the then surviving heirs at law of said Edith Huff according to the law of succession of the State of California then in effect, such person to be ascertained at the date of the termination of this portion of said trust.

(Trustee's Exhibit No. 1.)

"Should any of said bodily issue of said Rex Whitted not attain the age of twenty-one (21) years at the date of the death of said Edith Huff or at the time any of them are entitled to receive said sums above provided to be so divided among them, then the same shall be deposited in a savings account to be disbursed to said bodily issue when they attain the age of twenty-one (21) years, respectively, except that as hereinafter provided certain sums may be used for maintenance and education until said bodily issue attain said age of twenty-one (21) years.

"From the said above income to be paid into said savings account, as above provided, for said Donald Whitted, during the time and until said Donald Whitted shall attain the age of twenty-one (21) years, there shall be set aside the sum of fifty dollars (\$50.00) per month, which said sum shall be distributed and accumulated by said trustee in the following manner; ten dollars (\$10.00) per month thereof shall be used by said trustee toward the support and education of said Donald Whitted until he attains the age of eight (8) years; fifteen dollars (\$15.00) per month of said sum shall be used by said trustee toward the support and education of said Donald Whitted from the time he attains the age of eight (8) years until he attains the age of twelve (12) years; twenty-five dollars (\$25.00) per month of said sum shall be used by said trustee toward the maintenance and education of said Donald Whitted from the time he attains the age of twelve (12) years until he attains the age of sixteen (16) years; fifty dollars (\$50.00) per month shall be used by the said trustee toward the maintenance and education of said Donald [93] Whitted from the time he attains the

(Trustee's Exhibit No. 1.)

age of sixteen (16) years until he attains the age of Twenty-one (21) years, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sum of fifty dollars (\$50.00) per month shall be held, and the interest accumulated thereon, in said savings account to be distributed and paid to said Donald Whitted when he attains the age of twenty-one (21) years. The balance of said fifty dollars (\$50.00), as hereinbefore provided, shall be held and maintained in said savings account and the income accumulated thereon until said Donald Whitted attains the age of sixteen (16) years when said sums so accumulated in said savings account, including the earnings thereon, shall be used toward the maintenance and education of said Donald Whitted, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sums are to be accumulated and paid to him when he attains the age of twenty-one (21) years.

“From said income provided above to be deposited in said savings account to the credit and for the benefit of Jane Whitted, greatniece of said trustor, Edith Huff, there shall be set aside the sum of fifty dollars (\$50.00) per month, to be distributed and accumulated by the said trustee in the following manner: Twenty-five dollars (\$25.00) per month thereof to be used by the said trustee toward the maintenance and education of Jane Whitted until said Jane Whitted has attained the age of sixteen (16) years; fifty dollars (\$50.00) per month shall be used by the

(Trustee's Exhibit No. 1.)

trustee toward the maintenance and education of said Jane Whitted from the time she attains the age of sixteen (16) years until she attains the age of twenty-one (21) years, provided she attends a high school, college or university. If she does not attend a high school, college or university, said sum of fifty dollars (\$50.00) per month shall be held and maintained in said savings account [94] to be paid to said Jane Whitted, with the interest accumulated thereon, when she has attained the age of twenty-one (21) years. The balance of said sum of fifty dollars (\$50.00), as hereinbefore provided, shall be held in said savings account and the income accumulated thereon until said Jane Whitted attains the age of sixteen (16) years when the sums so accumulated in said savings account, including the earnings thereon, shall be used toward the maintenance and education of said Jane Whitted, provided she attends a high school, college or university. If she does not attend a high school, college or university, said sums are to be accumulated and paid to her, with the income accumulated thereon, when she attains said age of twenty-one (21) years.

“From the said above income hereinbefore provided to be held in said savings account to the credit and for the benefit of Billy Whitted, great-nephew of said Trustor, Edith Huff, until said Billy Whitted attains the age of twenty-one (21) years, there shall be set aside the sum of fifty dollars (\$50.00) per month, to be distributed to and accumulated for said Billy Whitted in the following

(Trustee's Exhibit No. 1.)

manner: Twenty-five dollars (\$25.00) per month thereof to be used by said trustee toward the maintenance and education of said Billy Whitted until he has attained the age of sixteen (16) years; fifty dollars (\$50.00) per month of said sum to be used by the trustee toward the maintenance and education of said Billy Whitted from the time he attains the age of sixteen (16) years until he attains the age of twenty-one (21) years, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sum of fifty dollars (\$50.00) per month shall be held and maintained in said savings account, to be paid to said Billy Whitted, together with the income accumulated thereon when he has attained the age of twenty-one (21) years. The balance of said fifty dollars (\$50.00) per month, as hereinbefore provided, shall be accumulated [95] in said savings account, together with the income earned thereon, for the benefit of said Billy Whitted until he attains the age of sixteen (16) years when the sums so accumulated in said savings account, including the earnings thereon, shall be used toward the maintenance and education of said Billy Whitted, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sums shall be held in said savings account, to be paid to said Billy Whitted, together with income accumulated thereon, when he attains the age of twenty-one (21) years."

(Trustee's Exhibit No. 1.)

It is a condition as to the distribution of the part of the trust estate distributed under this paragraph four, controlling all other provisions thereof and anything to the contrary therein notwithstanding, that the trusts as provided under this said paragraph four shall terminate and end immediately upon the death of said Edith Huff and all the specifically named Beneficiaries under said paragraph four who shall be alive at the date of the execution of said trust, and at said time the Trustee shall distribute all the principal or corpus of that part of the trust estate as provided for distribution under this paragraph four in its hands to the persons entitled thereto as provided therein.

In Witness Whereof, The First National Bank of Santa Ana, in its capacity as Trustee, has caused this instrument to be executed by its proper officer thereunto duly authorized, under its corporate seal, this 28 day of Aug., 1934.

THE FIRST NATIONAL BANK OF SANTA ANA

By..... Trust Officer.

Trustee. [96]

I, the undersigned, surviving Trustor, named in said Declaration of Trust No. 245, do hereby approve, ratify and confirm this Amendment to said Declaration of Trust No. 245, and I do hereby agree to be bound by all the terms thereof.

Dated this day of , 1934.

.....
Trustor. [97]

(Trustee's Exhibit No. 1.)

State of California

County of Orange—ss.

On this day of , 1934, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared C. L. Pritchard, known to me to be the Trust Officer of the corporation described in and that executed the within instrument, and known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness My hand and official seal.

Notary Public in and for said County and
State.

State of California

County of Orange—ss.

On this day of , 1934, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Edith Huff, known to me to be the person described in and whose name is subscribed to the within instrument, and she acknowledged to me that she executed the same.

Witness my hand and official seal.

Notary Public in and for said County and
State. [98]

(Trustee's Exhibit No. 1.)

AMENDMENT TO DECLARATION OF TRUST
NO. 245. (W. A. Huff)

Know All Men By These Presents:

That Whereas, there was duly executed under date of May 10th, 1927, a certain Declaration of Trust whereby the First National Bank of Santa Ana, Santa Ana, California, a national banking corporation, was named Trustee, and W. A. Huff and Edith Huff were named Trustors; and

Whereas, in said Declaration of Trust it is provided that in the event of the death of either of the Trustors the surviving Trustor reserves the right to amend or alter said Declaration of Trust insofar as the same shall relate to the distribution of one-half of the trust estate therein provided to be distributed to the family of the surviving Trustor by changing the name of the Beneficiaries or changing the amounts provided for any Beneficiary, and

Whereas, said W. A. Huff, one of the Trustors, died on the 19th day of November, 1928, and Edith Huff, said surviving Trustor under said Declaration of Trust, availed herself of the said foregoing provision and amended said trust as to the division of said one-half on the 29th day of August, 1934, by executing instrument in making amendment thereof, acknowledged on the 29th day of August, 1934.

Now, Therefore, paragraph four of said Declaration of Trust Number 245 as amended on August 29, 1934, is hereby stricken out in its entirety and each and every provision shall become and is hereby null and void, and in lieu thereof and substituted therefor, effective from this day and date, shall be the following:

(Trustee's Exhibit No. 1.)

Paragraph four:

"Following the death of said Edith Huff, one of the Trustors herein named, from that part of the trust estate referred to as "A" under paragraph three then remaining in the hands of the [99] trustee, the trustee shall pay her funeral expenses and expenses of last illness and legal debts, and thereafter the remainder shall be distributed by the Trustee to Bernice Lutz, niece of the said Trustor, Edith Huff. Should the said Bernice Lutz not be surviving at the time of the death of the said Edith Huff then said portion of the trust estate so to be distributed to the said Bernice Lutz shall be distributed in accordance with the terms of the last will and testament of the said Trustor, Edith Huff.

In Witness Whereof, The First National Bank of Santa Ana, in its capacity as Trustee, has caused this instrument to be executed by its proper officer thereunto duly authorized, under its corporate seal, this 29 day of May, 1935.

THE FIRST NATIONAL BANK OF SANTA ANA,
By C. L. PRITCHARD,
Trust Officer—Trustee.

I, the undersigned, surviving Trustor, named in said Declaration of Trust number 245, do hereby approve, ratify and confirm this amendment to said declaration of trust number 245, and I do hereby agree to be bound by all the terms thereof.

Dated this 28 day of May, 1935.

Edith Huff
Trustor. [100]

(Trustee's Exhibit No. 1.)

State of California

County of Orange—ss.

On this 29 day of May, 1935, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared C. L. Pritchard, known to me to be the Trust Officer of the corporation described in and that executed the within instrument, and known to me to be the person who executed the within instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

D. C. HAMILTON,

Notary Public in and for said County and
State.

State of California

County of Orange—ss.

On this 28 day of May, 1935, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Edith Huff, known to me to be the person described in and whose name is subscribed to the within instrument, and she acknowledged to me that she executed the same.

Witness my hand and official seal.

HELEN BURSON,

Notary Public in and for said County and
State. [101]

(Trustee's Exhibit No. 1.)

AMENDMENT TO DECLARATION OF TRUST
NO. 245. (W. A. Huff)

Know All Men By These Presents:

That Whereas, there was duly executed under date of May 10th, 1927, a certain Declaration of Trust whereby The First National Bank of Santa Ana, Santa Ana, California, a national banking corporation, was named Trustee and W. A. Huff and Edith Huff were named Trustors; and

Whereas, in said Declaration of Trust it is provided that in the event of the death of either of the Trustors the surviving Trustor reserves the right to amend or alter said Declaration of Trust insofar as the same shall relate to the distribution of one-half of the trust estate therein provided to be distributed to the family of the surviving Trustor by changing the name of the Beneficiaries or changing the amounts provided for any Beneficiary, and

Whereas, said W. A. Huff, one of the Trustors, died in the County of Orange, State of California, on the 19th day of November, 1928, and Edith Huff, said surviving Trustor under said Declaration of Trust, availed herself of the said foregoing provision and amended said trust as to the division of said one-half on the 28 day of May, 1935, by executing an instrument in making amendment thereof, acknowledged on the 28 day of May, 1935:

Now, Therefore, paragraph four of said Declaration of Trust No. 245 as amended on May 28, 1935, is hereby stricken out in its entirety and each and every provision shall become and is hereby null and void, and in lieu thereof and substituted therefor, effective from this day and date, shall be the following:

(Trustee's Exhibit No. 1.)

Paragraph four:

"Following the death of said Edith Huff, one of the Trustors herein named, from that part of the trust estate referred to as "A" under paragraph three then remaining in the hands of the trustee, the trustee shall pay her funeral expenses and expenses of last illness and legal debts, and thereafter there shall first be paid the [102] following sums to the respective persons mentioned below, namely:

"First: To the Christian Church of Santa Ana, California, the sum of twenty-five hundred dollars (\$2500.00).

"Second: To Stella Mitchell, niece of said Trustor, the sum of twenty-five hundred dollars (\$2500.00). Should said Stella Mitchell be not surviving or die before the death of said Edith Huff, then said sum of twenty-five hundred dollars (\$2500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Third: To Milo Mitchell, grand-nephew, of said Trustor, the sum of twenty-five hundred dollars (\$2500.00). Should said Milo Mitchell be not surviving or die before the death of said Edith Huff, then said sum of twenty-five hundred dollars (\$2500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Fourth: To Gladys Mitchell, grand-niece of said Trustor, the sum of twenty-five hundred dollars (\$2500.00). Should said Gladys Mitchell be not surviving or die before the death of said Edith Huff, then said sum of twenty-five hundred dollars (\$2500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

(Trustee's Exhibit No. 1.)

"Fifth: To Louie Beaty, nephew of said Trustor, the sum of twenty-five hundred dollars (\$2500.00). Should said Louie Beaty be not surviving or die before the death of said Edith Huff, then said sum of twenty-five hundred dollars (\$2500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Sixth: To Eileen Beaty, great-niece of said Trustor, the sum of five hundred dollars (\$500.00). Should said Eileen Beaty be not surviving or die before the death of Edith Huff, then said sum of five hundred dollars (\$500.00) shall be paid to Louie Beaty, the father of said Eileen Beaty. If, however, neither said Eileen [103] Beaty nor said Louie Beaty be surviving at the death of said Edith Huff, then said sum of five hundred dollars (\$500.00) shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four.

"Seventh: To Margaret Joanna Donahue, great-great-niece of the said Trustor, Edith Huff, and a daughter of Margaret Whitted Donahue, deceased, the sum of fifteen thousand dollars (\$15,000.00) provided the said Margaret Joanna Donahue has attained the age of twenty-seven years. If, however, said Margaret Joanna Donahue has not attained the age of twenty-seven years at the time of the death of the said Trustor, Edith Huff, but has attained the age of twenty-one years, then one-half of the said fifteen thousand dollars (\$15,000.00) shall be distributed to the said Margaret Joanna Donahue, and one-half shall remain in trust with the said Trustee and the income available therefrom shall be distributed to said Margaret Joanna Donahue until she has attained the age

(Trustee's Exhibit No. 1.)

of twenty-seven years, when the said trust estate created for her benefit as provided herein then remaining in the hands of the Trustee, together with any accumulation of income therefrom, shall be distributed to the said Margaret Joanna Donahue, and should the said Margaret Joanna Donahue not have attained the age of twenty-one years at the time of the death of said Trustor, Edith Huff, then the said fifteen thousand dollars (\$15,000.00) shall be held in trust by said Trustee and the income available for distribution shall be distributed to Bernice Lutz, niece of the Trustor, for the support and education of said Margaret Joanna Donahue, the said Bernice Lutz, insofar as this trust fund is concerned, to be known as the guardian of Margaret Joanna Donahue, and the amount needed for the support and education of the said Margaret Joanna Donahue is to be determined solely by said Bernice Lutz. Any income in excess of the actual amount designated by the said Bernice Lutz for the support and education of said Margaret Joanna Donahue is to become a part of the principal of the said trust fund created hereunder for her benefit. Should the said Margaret [104] Joanna Donahue not survive the said Trustor, Edith Huff, then the said sum of fifteen thousand dollars (\$15,000.00) shall be cancelled as to Margaret Joanna Donahue and is to become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph number four. Should said Margaret Joanne Donahue survive the Trustor, Edith Huff, but die before the termination of this trust fund created for her benefit, 50% of the amount remaining in trust for her benefit at the time of her death shall be distributed to her father, John J. Donahue, and the balance is to become a part of the residue

(Trustee's Exhibit No. 1.)

of the trust estate and distributed as hereinafter provided in this paragraph number four. Should the said John J. Donahue not be surviving at the death of said Margaret Joanna Donahue, then the 50% of the amount remaining in the trust of the benefit of Margaret Joanna Donahue shall become a part of the residue of the trust estate and distributed as hereinafter provided in this paragraph four.

"After payment of the funeral expenses, expenses of last illness and legal debts of the trustor, Edith Huff, together with the payments of the sums provided in subdivisions "First" to "Seventh", both inclusive, the balance of said one-half of the entire trust estate then remaining in the hands of the trustee shall be distributed, disposed of and handled in the following manner;

"An equal one-third share of said portion of the trust estate then remaining shall be distributed to Bernice Lutz, niece of said trustor, Edith Huff. Should said Bernice Lutz be not surviving at the death of said Edith Huff, but be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to said bodily issue per stirpes.

Should said Bernice Lutz not be surviving and not be survived by bodily issue, then said portion of said estate so to be distributed to said [105] Bernice Lutz shall be distributed to Ralph Sentney, brother of said Bernice Lutz, and should said Ralph Sentney be not surviving at said time, then one-fourth of said portion of said estate so to be distributed to Bernice Lutz shall be distributed to William Arthur Lutz, the husband of said Bernice Lutz, and the balance of said portion of said estate shall become a part of the trust estate and be held in trust for the benefit of Rex Whitted, nephew, Ella Whitted,

(Trustee's Exhibit No. 1.)

sister, Jane Whitted, Billy Whitted, Jack Whitted, and Donald Whitted, great-nieces and nephews of said Trustor, for the time and for the purposes hereinafter provided. Should said William Arthur Lutz be not surviving at said time, then said one-fourth of said estate shall become a part of the trust estate and held in trust as hereinafter provided for the benefit of said Rex Whitted, Ella Whitted, Jane Whitted, Billy Whitted, Jack Whitted, and Donald Whitted.

“An equal one-third share of said portion of the trust estate then remaining shall be distributed to Ralph Sentney, nephew of said Edith Huff. Should Ralph Sentney be not surviving at the date of death of said Edith Huff but be survived by bodily issue, then that portion of
to said Rslph Sentney shall be distributed
said estate so to be distributed \wedge to the bodily issue of said Ralph Sentney per stirpes. If, however, said Ralph Sentney be not surviving and not be survived by bodily issue, then said portion of said estate shall be distributed to Bernice Lutz, the sister of said Ralph Sentney, and should said Bernice Lutz be not surviving at said time, and should said Ralph Sentney be not survived by bodily issue, then one-half of said portion of said estate so to be distributed to said Rslph Sentney shall be distributed to the wife of said Ralph Sentney, if he is married, and said wife is living with him and no proceedings for divorce or separate maintenance be pending between them at the time of the death of said Rslph Sentney, and the other one-half of said estate shall become a part of the residue of the trust estate to be held in trust for the benefit of Rex Whitted, nephew, Ella Whitted, sister, Jane Whitted, Jack Whitted, Billy Whitted, and Donald Whitted great-

(Trustee's Exhibit No. 1.)

niece and nephews of said [106] Trustor, for the period of time and for the purposes hereinafter provided. Should said Ralph Sentney be not survived by a wife, or should said wife not be living with him or proceedings for divorce or separate maintenance be pending at the time of his death, then said one-half of said estate to which said wife would otherwise be entitled shall be distributed to Margaret Joanna Donahue, if the said Margaret Joanna Donahue has attained the age of twenty-seven years at the death of said Trustor, Edith Huff. If the said Margaret Joanna Donahue has not attained the age of twenty-seven years, then said one-half of said estate to which said wife would otherwise be entitled shall become a part of the trust estate created for Margaret Joanna Donahue under Subdivision Seven of this paragraph four, and should the said Margaret Joanna Donahue not be surviving then said portion of said trust estate shall become a part of the residue of the trust estate and held in trust for the benefit of said Rex Whitted, Ella Whitted, Jane Whitted, Jack Whitted, Billy Whitted, and Donald Whitted for the period of time and for the purposes hereinafter provided.

"An equal one-third share of said portion of the trust estate to remain in trust during the life of Ella Whitted, sister of said Trustor, and thereafter so long as Rex Whitted, nephew of said Trustor, shall live and until Donald Whitted, great-nephew of said Trustor, attains the age of eighteen (18) years, or if said Donald Whitted should die before attaining such age, then until such a time until said Donald Whitted would have attained the age of eighteen (18) years had he lived, and the income from this portion of said estate so held in trust,

(Trustee's Exhibit No. 1.)

provided said income will permit, shall be divided as follows:

“(a) One hundred dollars (\$100.00) per month of said income shall be paid to Rex Whitted, nephew of said Trustor, for his personal use during his life. Should the said Rex Whitted be not surviving or die before the death of said Edith Huff, then Katherine Whitted, the wife of said Rex Whitted, shall be paid said sum of one hundred dollars (\$100.00) per month during her life. Should the said Katherine Whitted [107] be not surviving or die before the death of said Edith Huff, then the said one hundred dollars (\$100.00) per month shall be divided and paid to the bodily issue of said Rex Whitted living at the date of execution of this declaration of trust, per stirpes, provided they have attained the age of twenty-one years. Any of said bodily issue of said Rex Whitted who have not, at the time of death of said Katherine Whitted, attained the age of twenty-one (21) years, then that part of the income which would have been distributed to them or any of them, should they or any of them have attained the age of twenty-one (21) years, shall be deposited in a savings account for the benefit of said bodily issue, respectively, who have not so attained the age of twenty-one (21) years, and the income so accumulated thereon shall be distributed to said bodily issue at such time as said bodily issue attain the age of twenty-one (21) years, respectively. Should any of said bodily issue of said Rex Whitted die during the time said bodily issue shall be entitled to receive his or their share of said one hundred dollars (\$100.00) per month, then the interest to which said bodily issue so deceased would be entitled shall be paid to and be divided equally among the survivor

(Trustee's Exhibit No. 1.)

or survivors of said bodily issue of said Rex Whitted, who may be living upon the execution of this declaration of trust. Upon the death of said Rex Whitted and the said Katherine Whitted, his said wife, and upon the death of all of the bodily issue of said Rex Whitted living at the date of the execution of this declaration of trust, then this trust, in so far as it relates to one-third share of said one-half portion of said estate so held in trust, shall ipso facto terminate and the said estate with accumulated income thereon shall be distributed to the persons who may be the then surviving heirs at law of said trustor, Edith Huff, according to the laws of succession of the State of California then in effect, such persons to be ascertained as of the date of the termination of this trust effecting said one-third portion of said one-half of the trust estate so held in trust. [108]

“(b) The sum of one hundred fifty dollars (\$150.00) of said income shall be paid to Ella Whitted so long as said Ella Whitted shall live, said sum to be paid monthly. Should said Ella Whitted be not surviving or die before the death of said Edith Huff or at any time after the death of said Edith Huff, at which time she would be entitled to receive said sum of one hundred fifty dollars (\$150.00) per month, the said sum shall be divided and paid one-third to Rex Whitted, the son of said Ella Whitted, and two-thirds thereof divided among and paid to Jane Whitted, Billy Whitted, Jack Whitted and Donald Whitted, grandchildren of said Ella Whitted and the bodily issue of Rex Whitted; provided, however, if, at such time, any of said bodily issue shall not have attained the age of twenty-one (21) years, the said income payable to

(Trustee's Exhibit No. 1.)

those of them who have not so attained such age shall be deposited in a savings account to be paid to said bodily issue as and when they reach the age of twenty-one (21) years, respectively. Upon the death of any of said bodily issue of said Rex Whitted at any time they are entitled to receive said share of said sum of one hundred fifty dollars (\$150.00) per month by reason of the death of said Ella Whitted, the interest or amount to which such bodily issue so deceased would be entitled to take, had such bodily issued lived, shall be divided equally among and paid to the survivor or survivors of said bodily issue, and the interest or amount any of said bodily issue who has not attained the age of twenty-one (21) years shall be deposited in said savings account to be distributed at the time said bodily issue shall attain said age of twenty-one (21) years, respectively.

“(c) The balance of the income of said estate then remaining in the hands of said trustee after the payment of said sums of one hundred dollars (\$100.00) and one hundred fifty dollars (\$150.00) monthly, as just above provided, shall be paid to and divided equally among the bodily issue of Rex Whitted, namely: Jane Whitted, Billy Whitted, Jack Whitted and Donald Whitted. Should any of said bodily issue be not surviving or die before the death of said Edith Huff, but be survived [109] by bodily issue then the amount provided to be paid to or accumulated for such bodily issue of said Rex Whitted shall be disbursed to the bodily issue of such deceased bodily issue of said Rex Whitted per stirpes. If, however, any one or more of said bodily issue of said Rex Whitted be not surviving or die before the death of said Edith Huff and not be survived by bodily issue of said deceased bodily

(Trustee's Exhibit No. 1.)

issue of said Rex Whitted, then the interest or amount to be paid to any of the bodily issue of said Rex Whitted so deceased, shall be divided equally amongst and be paid to the survivor or survivors of said bodily issue of said Rex Whitted, and upon the death of all of said bodily issue of said Rex Whitted this trust, in so far as it relates to said one-third share of said one-half part thereof, shall terminate forthwith and the trust estate then remaining in the hands of said trustee shall be distributed and such distribution shall be made in the following manner: The bodily issue of any of the deceased bodily issue of said Rex Whitted shall receive the estate and interest which said deceased bodily issue of said Rex Whitted would be entitled to receive had he or she lived, per stirpes; and the balance then remaining shall be distributed to the persons who may be the then surviving heirs at law of said Edith Huff according to the law of succession of the State of California then in effect, such person to be ascertained at the date of the termination of this portion of said trust.

"Should any of said bodily issue of said Rex Whitted not attain the age of twenty-one (21) years at the date of the death of said Edith Huff or at the time any of them are entitled to receive said sums above provided to be so divided among them, then the same shall be deposited in a savings account to be disbursed to said bodily issue when they attain the age of twenty-one (21) years, respectively, except that as hereinafter provided certain sums may be used for maintenance and education until said bodily issue attain said age of twenty-one (21) years.

"From the said above income to be paid into said savings account, as above provided, for said Donald Whitted, during the time and until said [110] Donald Whitted shall attain the age of twenty-one (21) years, there shall be

(Trustee's Exhibit No. 1.)

set aside the sum of fifty dollars (\$50.00) per month, which said sum shall be distributed and accumulated by said trustee in the following manner: Ten dollars (\$10.00) per month thereof shall be used by said trustee toward the support and education of said Donald Whitted until he attains the age of eight (8) years; fifteen dollars (\$15.00) per month of said sum shall be used by said trustee toward the support and education of said Donald Whitted from the time he attains the age of eight (8) years until he attains the age of twelve (12) years; twenty-five dollars (\$25.00) per month of said sum shall be used by said trustee toward the maintenance and education of said Donald Whitted from the time he attains the age of twelve (12) years until he attains the age of sixteen (16) years; fifty dollars (\$50.00) per month shall be used by the said trustee toward the maintenance and education of said Donald Whitted from the time he attains the age of sixteen (16) years until he attains the age of twenty-one (21) years, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sum of fifty dollars (\$50.00) per month shall be held, and the interest accumulated thereon, in said savings account to be distributed and paid to said Donald Whitted when he attains the age of twenty-one (21) years. The balance of said fifty dollars (\$50.00), as hereinbefore provided, shall be held and maintained in said savings account and the income accumulated thereon until said Donald Whitted attains the age of sixteen (16) years when said sums accumulated in said savings account, including the earnings thereon, shall be used toward the maintenance and education of said Donald Whitted, provided he attends a high

(Trustee's Exhibit No. 1.)

school, college or university, said sums are to be accumulated and paid to him when he attains the age of twenty-one (21) years.

"From said income provided above to be deposited in said savings account to the credit and for the benefit of Jane Whitted, greatniece of said trustor, Edith Huff, there shall be set aside the sum of fifty [111] dollars (\$50.00) per month, to be distributed and accumulated by the said trustee in the following manner: Twenty-five dollars (\$25.00) per month thereof to be used by the said trustee toward the maintenance and education of Jane Whitted until said Jane Whitted has attained the age of sixteen (16) years; fifty dollars (\$50.00) per month shall be used by the trustee toward the maintenance and education of said Jane Whitted from the time she attains the age of sixteen (16) years until she attains the age of twenty-one (21) years, provided she attends a high school, college or university. If she does not attend a high school college or university, said sum of fifty dollars (\$50.00) per month shall be held and maintained in said savings account to be paid to said Jane Whitted, with the interest accumulated thereon, when she has attained the age of twenty-one (21) years. The balance of said sum of fifty dollars (\$50.00), as hereinbefore provided, shall be held in said savings account and the income accumulated thereon until said Jane Whitted attains the age of sixteen (16) years when the sums so accumulated in said savings account, including the earnings thereon, shall be used toward the maintenance and education of said Jane Whitted provided she attends a high school, college or university. If she does not attend a high school, college or university, said sums are to be accumulated and paid

(Trustee's Exhibit No. 1.)

to her, with the income accumulated thereon, when she attains said age of twenty-one (21) years.

"From the said above income hereinbefore provided to be held in said savings account to the credit and for the benefit of Billy Whitted, great-nephew of said Trustor, Edith Huff, until said Billy Whitted attains the age of twenty-one (21) years, there shall be set aside the sum of fifty dollars (\$50.00) per month, to be distributed to and accumulated for said Billy Whitted in the following manner; Twenty-five dollars (\$25.00) per month thereof to be used by said trustee toward the maintenance and education of said Billy Whitted until he has attained the age of sixteen (16) years; fifty dollars (\$50.00) per month of said sum to be used by the trustee toward [112] the maintenance and education of said Billy Whitted from the time he attains the age of sixteen (16) years until he attains the age of twenty-one (21) years, provided he attends a high school, college or university. If he does not attend a high school, college or university, said sum of fifty dollars (\$50.00) per month shall be held and maintained in said savings account, to be paid to said Billy Whitted, together with the income accumulated thereon when he has attained the age of twenty-one (21) years. The balance of said fifty dollars (\$50.00) per month, as hereinbefore provided, shall be accumulated in said savings account, together with the income earned thereon, for the benefit of said Billy Whitted until he attains the age of sixteen (16) years when the sums so accumulated in said savings account, including the earnings thereon, shall be used toward the maintenance and education of said Billy Whitted, provided he attends a high school, college or university. If he does not attend

(Trustee's Exhibit No. 1.)

a high school, college or university, said sums shall be held in said savings account, to be paid to said Billy Whitted, together with income accumulated thereon, when he attains the age of twenty-one (21) years."

It is a condition as to the distribution of the part of the trust estate distributed under this paragraph four, controlling all other provisions thereof and anything to the contrary therein notwithstanding, that the trusts as provided under this said paragraph four shall terminate and end immediately upon the death of said Edith Huff and all the specifically named Beneficiaries under said paragraph four who shall be alive at the date of the execution of said trust, and at said time the Trustee shall distribute all the principal or corpus of that part of the trust estate as provided for distribution under this paragraph four in its hands to the persons entitled thereto as provided therein.

In Witness Whereof, The First National Bank of Santa Ana, in its capacity as Trustee, has caused this instrument to be executed by its proper officer thereunto duly authorized, under its corporate seal, this 3rd day of August, 1935. [113]

THE FIRST NATIONAL BANK OF SANTA ANA,
By C. L. PRITCHARD

Trust Officer-Trustee.

I, the undersigned, surviving Trustor, named in said Declaration of Trust No. 245, do hereby approve, ratify and confirm this amendment to said Declaration of Trust No. 245, and I do hereby agree to be bound by all the terms thereof,

Dated this 3rd day of August, 1935.

EDITH HUFF

Trustor. [114]

(Trustee's Exhibit No. 1.)

State of California

County of Orange—ss.

On this 3rd day of August, 1935, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared C. L. Pritchard, known to me to be the Trust Officer of the corporation described in and that executed the within instrument, and *know* to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Witness my hand and official seal.

(Seal)

N. OPAL DAVIS,

Notary Public in and for said County and
State.

State of California

County of Orange—ss.

On this 3rd day of August, 1935, before me, the undersigned, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Edith Huff, known to me to be the person described in and whose name is subscribed to the within instrument, and she acknowledged to me that she executed the same.

Witness my hand and official seal.

(Seal)

H. OPAL DAVIS,

Notary Public in and for said County and
State.

Trustee's Exhibit No. 1

[Endorsed]: Filed Oct. 13, 1943, Hubert F. Laugharn,
Referee.

[Endorsed]: Filed Feb. 4, 1944 [115]

[EXHIBIT NO. 2.]

SPENDTHRIFT TRUSTS:

Inasmuch as a gift takes nothing from the prior or subsequent creditors of a beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided that the property or income shall go or be paid to the beneficiary and shall not be subject to the claims of creditors.

McColgan vs. Magee, Inc., 172 Cal. 182.

REST. TRUSTS. SEC. 152, PAGE 374.

Under the provision of the National Bankruptcy Act, the interest of a beneficiary, if it cannot be transferred by him and cannot be reached by his creditors, does not pass to his trustee in bankruptcy.

REST. TRUSTS, SEC. 147-D, Page 362.

By the provisions of the National Bankruptcy Act the trustee in bankruptcy is vested with the title of the bankrupt to property which prior to the filing of the petition the bankrupt could by any means have transferred or which might have been levied upon and sold under a judicial process against him, and the trustee in bankruptcy is vested with the powers of a judgment creditor having an unsatisfied execution. (Ref. Nat'l Bankruptcy Act, Sec. 70-A and 47-A.)

The situations in which the interest of the beneficiary of a trust cannot be voluntarily transferred by him or in which creditors cannot subject it to the satisfaction of their claims are stated in Sec. 149-162 of Restatement on Trusts.

See 64 Pac. 2nd. 1013

(Trustee's Exhibit No. 2.)

A beneficiary of a trust to sell the corpus and pay the proceeds to him has no transferable interest in the corpus.

Craven vs Dominguez Est. Co. (1925) 72 Cal App. 713 (237 Pac. 821)

Where a trust is created for the benefit of another, the beneficiary may be restrained by appropriate provisions of the trust instrument from disposing of his interests or ownership.

172 Cal. 182 (121 Cal 438.) [116]

Where a trust confers upon the trustee an authority to choose or change the beneficiary, or gives him a discretion which he is not obliged to exercise in favor of the bankrupt, the latter's expectation of benefits by the trust is not an interest which will pass to his trustee in bankruptcy.

Nichols vs Eaton, 91 U. S. 716.

Trustee in Bankruptcy takes no higher or greater estate than the bankrupt himself possessed when the Trustee was appointed; and hence where conditions upon which the bankrupt was to become entitled to a trust fund were not performed until after his adjudication, and after his debts had been extinguished by his discharge, his Trustee had no title thereto for the use of creditors.

Hull v. Palmer, 140 N. Y. S. 811

An expectancy in the estate of a living person does not pass to the Trustee in Bankruptcy. The interest of a bankrupt in a joint reciprocal Will which makes provision for the devising of the property to him after the death of the survivor does not pass to the trustee in

(Trustee's Exhibit No. 2.)

bankruptcy if the survivor takes the property absolutely or has the power of disposition otherwise, but it does pass to the trustee if the survivor has a mere life estate in the property with remainder to the bankrupt.

8 C. J. S. 632

Where the bankrupt's aged mother executed a Will September 14, 1917, leaving him practically her entire estate and he filed a petition in bankruptcy before her death October 7th, his contingent interest under the Will was not an asset of his estate, for the mother might at any time have changed her Will.

In Re Seal (DCNY) 261 Fed. 112.

Levy

Execution on interest of Beneficiary (Not subject to sale)

Anglo-Cal-Nat Bank vs Kidd 137 Pac 2nd 460

Title is in Trustees of Trust Not in Beneficiaries [117]
§863 Civil Code Calif so expressly provides re an Express Trust also see §864.

See: 7 Cal. App 248 (94 P. 252)

76 Cal. App 655 (245 P. 803)

181 Cal. 604, 606 (188 P. 985)

REST. TRUSTS—SEC. 168-F, Page 644

When under the local law a remainder subject to a condition precedent or other future interest is transferable only by release or by a deed creating an estoppel, or by a transaction enforced in equity, such interest is not a future interest, "which prior to the filing of the petition the bankrupt could by any means have transferred," and is not a future interest which passes to the Trustee in Bankruptcy.

(Trustee's Exhibit No. 2.)

Where the beneficiary has no present right of enjoyment or *power* of alienation, his interest cannot be reached by his creditors.

65 C. J. 554

Where one for whom property is held in trust becomes a bankrupt, his entire interest in the trust estate passes to the Trustee in Bankruptcy dependent on whether the bankrupt's beneficial interest is transferrable or subject to judicial sale, this being determined by the law of the state where the trust was created and the property is situated. Where, by the terms of the trust, the right of creditors to the trust estate are cut off in jurisdictions where such limitations are upheld, the trust estate does not pass to the Trustee in Bankruptcy.

8 C. J. S. 631

Similarly, where property held in trust for a bankrupt is not subject to the claims of his creditors prior to his discharge in bankruptcy, a subsequent conveyance of the property to him will not render it subject to debts antedating his discharge, although the Trustee purposely delays the conveyance.

8 C. J. S. 663

The fact that a voluntary bankrupt, who had practically [118] no assets, filed his petition to protect from his creditors a legacy he expected to receive shortly from his mother, does not warrant a setting aside of his adjudication as a bankrupt, since the purpose of Bankruptcy Act was to protect after-acquired property from creditors, and the fact that he had some special property in view does not change his rights.

Bank of Eberton vs. Swift, 268 Fed. 305 Cited
in 8 C. J. S. 482

(Trustee's Exhibit No. 2.)

In order to invoke the extraordinary powers of a court of equity to vacate or ignore an order of adjudication of bankruptcy because procured by extrinsic fraud, the party making the attack must show injury by reason of the order.

8 C. J. S. 485

Creditor cannot question validity of trust.

8 C. J. S.—Bankruptcy Section 179—1943 Cumulative Pocket

§866—Interest remains in grantor of Trust.

Restraints—valid—§867—Civil Code Calif.

The crime of conspiracy to conceal assets cannot be committed unless the assets to be concealed are such as the Trustee in Bankruptcy is entitled to receive.

Rem. on Bankruptcy, Sec. 3000, Page 21 5th Edition

Mere expectancies do not pass.

Rem. on Bankruptcy, Sec. 1219.05 4th Edition

The right of a beneficiary named in a policy on the life of another with right to change beneficiaries reserved is a mere expectancy. No interest passes upon the bankruptcy of the beneficiary during the lifetime of the assured.

I. D.

See: Restatement—Future Interest.

2 A. L. R. 858

Citing: In Beck's Estate, 133 Pa. 51.

Bequest upon condition that it be not liable to be attached for debts of legatee, but paid directly to legatee. [119]

(Trustee's Exhibit No. 2.)

Held: Effective to protect the fund in transit from the executor to the legatee.

(Even though no strings attached after payment to legatee)

In Hartman's Estate, 31 Pa. Super. Ct. 152 Same facts held to invalidate an assignment of legatee's interest in estate.

REST. PROP. FUTURE INTERESTS—Sec. 168 (P. 637)

When in the course of the bankruptcy proceedings the bankrupt has failed to reveal his ownership of a future interest, to which his trustee is entitled, such concealment, followed by the subsequent discovery of such ownership, provides the same basis for denying the bankrupt his discharge, as his failure to reveal his ownership of any other asset.

Page 639.

The presence of a restraint on the alienation of a future interest does not prevent the acquisition of such interest by the Trustee. Unless the terms of the restraint would be violated thereby.

Page 639

The rules defining permissible restraints or alienation and permissible provisions as to conditions precedent and as to defeasance or alienation, make it possible for the creators of future interests that it cannot pass to or be reached by the Trustee in Bankruptcy.

[Endorsed]: Trustee's Exhibit No. 2 Filed Oct 13 1943 Hubert F. Laugharn Referee

[Endorsed]: Filed Feb. 4, 1944.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

Number 10792

In the Matter of

CHARLES RALPH SENTNEY,

Bankrupt.

ADOPTION OF POINTS FILED IN TRIAL
COURT.

Now comes the Appellant in the above entitled matter and hereby adopts the Statement of Points upon which he will rely on appeal, which was filed by him with the Clerk of the Trial Court.

Appellant further states that he desires to have the entire record printed as the same was certified by the Trial Court.

Dated this 9th day of June, 1944.

EARL E. MOSS and LOUIS LOMBARDI

By Louis Lombardi

Attorneys for Appellants.

[Endorsed]: Filed Jun. 12, 1944. Paul P. O'Brien, clerk.

[Endorsed]: No. 10792. United States Circuit Court of Appeals for the Ninth Circuit. Harry Ashton, as Trustee in Bankruptcy of the Estate of Charles Ralph Sentney, Appellant, vs. Charles Ralph Sentney, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 9, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 10,792.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY ASHTON, as Trustee in Bank-
ruptcy of the Estate of Charles Ralph
Senteney,

Appellee.

vs.

CHARLES RALPH SENTENEY,

Appellee.

APPELLANT'S OPENING BRIEF.

EARL E. MOSS,

841 South Serrano, Los Angeles 5,

LOUIS LOMBARDI,

528 Associated Realty Building, Los Angeles 14,

Attorneys for Appellant.

FILED

AUG 21 1964

TOPICAL INDEX.

	PAGE
Jurisdictional statement	1
Statement of the case.....	2
Summary of argument.....	6
Argument	7
1. The law presumes that the omission of the interest in the trust from the schedules was intentional and fraudulent, and the bankrupt did not overcome this presumption, and his discharge should be revoked under Section 15 of the Bankruptcy Act	7
2. The bankrupt was not warranted in relying upon the advice of counsel with reference to plain, palpable and transparent facts	23
3. While the provisions of the trust prohibited alienation and levy by creditors during its existence, it terminated upon the death of Edith Huff, and the bankrupt could have assigned his interest at any time, effective as of the date of the termination of the trust, and therefore the title to the bankrupt's interest passed to the trustee, effective as of the date of the termination of the trust.....	25
4. Even if the title did not pass to the trustee, the trustee is in the position of the most favored creditor and is entitled to the same equitable relief that was given the plaintiff in <i>Kelley v. Kelley</i>	28

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Breitling, In re, 133 Fed. 146.....	12, 23
Duggins v. Heffron, 128 F. (2d) 546.....	16
Farmer's Savings Bank, et al. v. Anton, 1 F. (2d) 103.....	7, 12
Heilbronner v. L. Dinkelspiel Co., 20 F. (2d) 93.....	11
Kelley v. Kelley, 11 Cal. (2d) 356.....	25, 27, 28
Macfarlane, In re, 45 F. (2d) 994.....	16
Merritt, In re, 28 F. (2d) 679.....	14
Pollack v. Meyer Bros. Drug Co., 233 Fed. 861.....	15
Remington on Bankruptcy, Sec. 577.....	11, 12
Russell, In re, 52 F. (2d) 794.....	14
Shute, In re, 38 F. (2d) 769.....	8, 11
Siegel v. Cartel, 164 Fed. 691.....	12
Sinclair v. Butt, 284 Fed. 568.....	9, 12, 15, 20, 24
The Perel, 51 F. (2d) 506.....	14, 24
M. Witmark & Son v. Fred Fisher Music Company, 125 F. (2d) 949	25, 26

STATUTES.

Bankruptcy Act, Sec. 14.....	15
Bankruptcy Act, Sec. 15	7, 15
Bankruptcy Act, Sec. 24a.....	1
Bankruptcy Act, Sec. 39c.....	1
Bankruptcy Act, Sec. 70a(5).....	25
Bankruptcy Act, Sec. 70, Subd. (a)(7).....	17

No. 10,792.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY ASHTON, as Trustee in Bankruptcy of the Estate of Charles Ralph Senteney,

Appellee.

vs.

CHARLES RALPH SENTENEY,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

In the course of the bankruptcy proceedings of Charles Ralph Senteney the referee made findings of fact and an order [Rec. pp. 35 to 45] denying the trustee's petition for an order revoking the bankrupt's discharge, and denying the trustee's petition for an order that he was the owner of the bankrupt's interest in a certain trust known as Trust No. 245 with the First National Bank of Santa Ana, California. A review of the referee's order was had in the District Court pursuant to Section 39c of the Bankruptcy Act [Rec. pp. 46-47]. The District Judge adopted the findings of the referee [Rec. pp. 51-52]. From the order of the District Judge an appeal was taken to this court [Rec. p. 53] under the provisions of Section 24a of the Bankruptcy Act.

Statement of the Case.

Charles Ralph Senteney, the bankrupt herein, was the nephew of W. A. Huff and Edith Huff, who created the trust in the First National Bank of Santa Ana, California, mentioned in this proceeding. W. A. Huff died in October, 1927, and Edith Huff on April 20, 1943. The bankrupt resided in Los Angeles since 1924, from which date, until the death of W. A. Huff in 1927, the bankrupt saw his aunt and uncle an average of once a month. Within thirty days of the death of W. A. Huff, Edith Huff showed the bankrupt a copy of the declaration of trust [Rec. pp. 67-68], and he had a copy in his possession for sometime. During the last ten or twelve years on an average of six months in the year the bankrupt saw Edith Huff daily [Rec. p. 69], and lived next door to her except when she went to Balboa. She consulted the bankrupt frequently concerning her property matters [Rec. p. 70].

The bankrupt filed a voluntary petition in bankruptcy on October 16, 1942 [Rec. pp. 2-3]. At the time the bankrupt consulted his attorney regarding the filing of such petition he discussed the matter of the trust with him [Rec. p. 72]. Possibly a year or eighteen months prior to the filing of the petition in bankruptcy the bankrupt took a copy of the declaration of trust to his attorney and consulted him concerning income from the trust, in which matter the bankrupt was representing Edith Huff [Rec. pp. 73-74]. Several other times the bankrupt represented Edith Huff in income matters concerning the trust. His aunt was not well at the time. On such occasions the bankrupt discussed the matter of the trust with the trust officers of the bank in connection

with income. On the occasion that the bankrupt first discussed his bankruptcy with his attorney, he told his attorney what the trust contained concerning himself [Rec. p. 74]. At the time that the bankrupt took up the matter of the income from the trust with his attorney he believed that his attorney made a copy of the trust. The bankrupt did not remember whether at the time of the discussion of the bankruptcy proceedings his attorney brought out a copy of the declaration of trust and discussed it with him, but he would be inclined to say that he did [Rec. p. 75]. The bankrupt's aunt had a copy of the trust at her house which he had looked over.

In Schedule B-4, verified and filed by the bankrupt, calling for a description of "property in reversion, remainder or expectancy, including property held in trust for the debtor, or subject to any power or right to dispose of or to charge", the bankrupt filled in the word "none" in four places [Rec. p. 40].

At or immediately prior to the filing of the schedules in bankruptcy, the bankrupt's attorney, Martin Goldman, had in his possession a copy of the trust and some of the amendments. At that time he was generally familiar with the terms of the trust [Rec. p. 96]. Prior to the preparation of the schedules in bankruptcy Martin Goldman considered the terms of the trust as to whether or not there was any interest of property, expectancy or otherwise, which the bankrupt should schedule in his schedules, and discussed the matter with the bankrupt. After fifteen or twenty hours briefing the subject he gave the bankrupt an opinion that he had no interest in the trust and that it need not be scheduled and he did not include it in the schedules [Rec. p. 97]. Martin Goldman testified that

he did not have any intent to conceal from the trustee or creditors the existence of any property or to cause his client to conceal any property from the court or trustee, or to cause his client to make a false oath [Rec. p. 98].

The brief which Martin Goldman prepared as a basis for his advice to the bankrupt that the interest in the trust need not be described in the schedules, was introduced in evidence as Trustee's Exhibit 2, and appears on pages 239 to 244 of the record. According to the findings [Finding VII, Rec. p. 41], the first three pages of this brief were prepared prior to filing the schedules. The fourth page of the original brief begins with the words "The crime of conspiracy", etc., about the center of page 243 of the record.

Four or five days after the matter of the bankruptcy was first discussed between the bankrupt and his attorney, the attorney gave the bankrupt an opinion as to whether or not the interest in the trust should be described in the schedules, and in that conversation he told the bankrupt that he had no interest in the trust, and therefore it should not be included in the schedules [Rec. p. 101]. He did not have any discussion with the bankrupt wherein the advisability of setting forth all the facts in the schedules was discussed. He explained to the bankrupt the meaning of Schedule B-4 but did not discuss it with him. They had no discussion as to whether or not it would be advisable to set all the facts forth in the schedules and let the court determine whether or not there was any title or anything that passed to the trustee. Several times, maybe one or two, before the schedules were filed, the bankrupt and Martin Goldman, his attorney, discussed generally the bankrupt's assets and liabilities. In that discussion they discussed the possibility that the

bankrupt might have an interest in the trust. The bankrupt's attorney got out a copy of the trust and told the bankrupt that he could not tell him at once whether that was an asset or not, and five or six days or maybe a week later he told the bankrupt it was not [Rec. p. 103]. The reason the bankrupt gave his attorney for desiring to file the petition in bankruptcy was that he had been in the real estate business and in the construction business, and because of the war that business had ceased and he couldn't get any more materials; he had been out of business at that time for practically a year and a half and he was simply eating up his accumulated earnings trying to keep his office open; he was taking his medical examination and he had an obligation to his brother-in-law coming due of many thousands of dollars, and if he went into the army he wanted to feel free and easy about his obligations. He did not say anything to his attorney about the fact that his aunt was getting old and her health was not any too good and he had better get this thing cleared up before she died so the creditors wouldn't grab it. The age or condition of health of the bankrupt's aunt was not discussed at all and the effect of her death, permitting creditors to acquire what he received or might receive from her was not discussed until after the first meeting of creditors. The bankrupt's attorney had not explained to the bankrupt prior to the first meeting of creditors the provisions of the law concerning any property that he might acquire by devise or descent within six months after the filing of the petition [Rec. p. 105]. The bankrupt's attorney had met the bankrupt's aunt and knew she was of advanced age and poor health, but she had been in poor health for many years [Rec. p. 106].

The referee found that the interest in the trust should have been described in the bankrupt's schedules, but that the bankrupt was not guilty of any bad faith or concealment of assets or knowingly or intentionally making a false oath [Rec. p. 42], and denied both the petition for an order revoking the bankrupt's discharge and the petition for an order that the trustee was the owner of the bankrupt's interest in the trust. The District Judge adopted the referee's findings and order.

Summary of Argument.

1. THE LAW PRESUMES THAT THE OMISSION OF THE INTEREST IN THE TRUST FROM THE SCHEDULES WAS INTENTIONAL AND FRAUDULENT, AND THE BANKRUPT DID NOT OVERCOME THIS PRESUMPTION, AND HIS DISCHARGE SHOULD BE REVOKED UNDER SECTION 15 OF THE BANKRUPTCY ACT.

2. THE BANKRUPT WAS NOT WARRANTED IN RELYING UPON THE ADVICE OF COUNSEL WITH REFERENCE TO PLAIN, PALPABLE AND TRANSPARENT FACTS.

3. WHILE THE PROVISIONS OF THE TRUST PROHIBITED ALIENATION AND LEVY BY CREDITORS DURING ITS EXISTENCE, IT TERMINATED UPON THE DEATH OF EDITH HUFF, AND THE BANKRUPT COULD HAVE ASSIGNED HIS INTEREST AT ANY TIME, EFFECTIVE AS OF THE DATE OF THE TERMINATION OF THE TRUST, AND THEREFORE TITLE TO THE BANKRUPT'S INTEREST PASSED TO THE TRUSTEE, EFFECTIVE AS OF THE DATE OF THE TERMINATION OF THE TRUST.

4. EVEN IF THE TITLE DID NOT PASS TO THE TRUSTEE, THE TRUSTEE IS IN THE POSITION OF THE MOST FAVORED CREDITOR AND IS ENTITLED TO THE SAME EQUITABLE RELIEF THAT WAS GIVEN THE PLAINTIFF IN KELLEY V. KELLEY.

ARGUMENT.

1. The Law Presumes That the Omission of the Interest in the Trust From the Schedules Was Intentional and Fraudulent, and the Bankrupt Did Not Overcome This Presumption, and His Discharge Should Be Revoked Under Section 15 of the Bankruptcy Act.

Bankruptcy Act, Section 15:

“The Court may, upon application of parties in interest who have not been guilty of undue laches, filed at any time within one year after the discharge shall have been granted, revoke it if it shall be made to appear that it was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the petitioners since the granting of the discharge and that the actual facts did not warrant the discharge.”

The petition for an order revoking the discharge [Rec. pp. 5-6] alleged all the facts necessary under Section 15, and the referee found in favor of petitioner on all issues except that the discharge was obtained through the fraud of the bankrupt and that the actual facts did not warrant the discharge.

Farmers' Savings Bank, et al. v. Anton, 1 F. (2d) 103 (C. C. A. 8):

“The filing of the petition in bankruptcy and the schedules, in legal effect, amounted to a solemn declaration and representation by the bankrupt to the bankruptcy court, the trustee and the creditors that every statement contained therein was true, and that every item of property belonging to the bankrupt and which under the Bankruptcy Act should be listed therein, had been so listed. The act is of such a

The referee found that the interest in the trust should have been described in the bankrupt's schedules, but that the bankrupt was not guilty of any bad faith or concealment of assets or knowingly or intentionally making a false oath [Rec. p. 42], and denied both the petition for an order revoking the bankrupt's discharge and the petition for an order that the trustee was the owner of the bankrupt's interest in the trust. The District Judge adopted the referee's findings and order.

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“The filing of the petition in bankruptcy and the schedules, in legal effect, amounted to a solemn declaration and representation by the bankrupt to the bankruptcy court, the trustee and the creditors that every statement contained therein was true, and that every item of property belonging to the bankrupt and which under the Bankruptcy Act should be listed therein, had been so listed. The act is of such a

nature that its direct tendency is to disarm suspicion and halt investigation.

“That this is true will become apparent when it is remembered that the bankrupt in verifying the petition, ‘makes solemn oath that the statements contained therein are true according to his best knowledge, information and belief, . . . that the schedules hereto annexed, marked Exhibit B, and verified by your petitioner’s oath, contains an accurate inventory of all his property, both real and personal’ and is ‘a statement of all his estate both real and personal in accordance with the Act of Congress relating to Bankruptcy’; and that the bankrupt possesses no other ‘goods or personal property of any other description’.

“Because of the nature and tendency of the acts and declarations mentioned, the law presumes, if property which should have been included in the schedules is omitted therefrom, that its omission was intentional and fraudulent, and for the purpose of concealing the same with intent to hinder, delay and defraud his creditors. The burden is cast upon the bankrupt to overcome that presumption by a satisfactory explanation of the omission before he can obtain a discharge from his debts.”

In re Shute, 38 F. (2d) 769 (C. C. A. 9):

“Because of the nature and tendency of the act and declarations mentioned, the law presumes, if property which should have been included in the schedules is omitted therefrom, that its omission was intentional and fraudulent, and for the purpose of concealing the same with intent to hinder, delay and defraud his creditors. The burden is cast upon the bankrupt to overcome that presumption by a satis-

factory explanation of the omissions before he can obtain a discharge from his debts." . . .

"If intelligent bankrupts can be relieved of the consequences of false statements in these returns for reasons which are here offered, the fear of a denial of a discharge would constitute no deterrent to concealment and falsity. Here, as elsewhere, if one to his own advantage and in careless disregard of the rights of others recklessly asserts to be true that which by use of means at hand he could easily learn to be untrue, he is chargeable with fraud."

Applying this court's language as used in the above decision to this matter, not only by use of the means at hand could the bankrupt have learned that the interest in the trust estate should have been scheduled, but also there was no facts that indicated that it could be properly omitted from the sworn schedules.

Evidence is required to overcome a presumption, and in this matter there is not only no such evidence, but, on the contrary, the evidence proves clearly that the conduct of the bankrupt in concealing the existence of the trust was deliberate and premeditated. The facts are similar to those in *Sinclair v. Butt*, 284 F. 568, where the Circuit Court of the Eighth Circuit said that the oath of the bankrupt was knowingly false because the assets omitted from the schedules were discussed by the bankrupt and his attorney before the schedules were made out. This is not a case where the asset was overlooked or was considered too trifling in value to be included, but one where the matter of the omission of the trust interest from the schedules was discussed several times, a brief was prepared, and both the bankrupt and his attorney knew that

it was being omitted and intended to omit it. The bankrupt had literally lived with this trust for probably fifteen years, and his attorney had a copy of it in his possession for months before the preparation of the schedules. They do not contend that they did not understand the nature of the document. The ground adopted by the bankrupt's attorney as a basis for the omission of the trust interest from the schedules, that the title thereto did not pass to the trustee in bankruptcy, is not only not the law, BUT THE VERY BRIEF WHICH THE ATTORNEY PREPARED AS AUTHORITY FOR HIS ADVICE CONTAINS NO AUTHORITY TO SUPPORT HIS POSITION, and the correct rule of law was available on every hand. In fact, it is impossible to comprehend how any attorney could spend, not fifteen or twenty hours, but two hours and not find the correct rule of law.

Let us put ourselves in the position of the bankrupt's attorney, advising our client in this matter, and having in mind all the duties and responsibilities of an attorney, as well as the effect on the client of a false oath, the concealment of assets, the possibility of the denial of a discharge and prosecution and imprisonment. It also requires a very unusual type of mind for an attorney to not consider his own position, the possible indictment for conspiracy to conceal assets, subordination of perjury and disbarment for advising the violation of a law.

The very wording of Schedule B-4 is of itself a most compelling authority for the inclusion in this schedule of any assets that might possibly come within the definitions therein set forth. The whole nature of the bankruptcy proceedings is such as to put even the veriest tyro on notice that this is a proceeding in which it has been neces-

sary to answer the most detailed questions concerning assets and wherein it was intended that the bankrupt shall describe everything he may own or expect to acquire, all in a serious proceeding under oath. There are no conditions that would justify the omission of the trust interest from the bankrupt's schedules. Including it in the schedules would not prejudice the bankrupt's rights. If he had any reservation or argument that the title did not pass such could be included in the schedules with the description of the trust interest.

Accompanying counsel for the bankrupt on his search for the law, and accepting, for the moment, his position that he would be justified in disregarding the plain mandate of the bankruptcy petition and schedules, let us see what he would find in a few moments' examination of some of the leading authorities on bankruptcy.

Probably the best known and most widely used text book on bankruptcy is Remington, section 577 of which is as follows:

"Section 577. Schedule B. calls for a complete statement of all the property of the bankrupt. If property has been omitted from Schedule B the law presumes, in the absence of a showing to the contrary, that the omission is intentional and fraudulent. The burden is cast on the bankrupt to overcome the presumption by a satisfactory explanation of the omission before he can get his discharge."

Cited as authority for the foregoing text are the following decisions:

In re Shute. 38 F. (2d) 769 (C. C. A. 9);

Heilbronner v. L. Dinkelspiel Co., 20 F. (2d) 93;

Farmers Savings Bank v. Anton, 1 F. (2d) 103;

Sinclair v. Butt, 284 F. 568;

Siegel v. Cartel, 164 F. 691;

In re Breitling, 133 F. 146.

It would require but a moment to ascertain that the foregoing decisions all support the rule stated by Remington.

Section 577 of Remington then continues:

“When it is proven that the bankrupt had cash which he did not schedule, his discharge will be denied. In like manner, the deliberate failure to schedule insurance policies is not only concealment, but the verification of the schedule with such an omission in it constitutes a false oath within the meaning of Section 29b(2), 11 USCA 48b(2). It is the duty of the bankrupt to list all his insurance policies so that the trustee can consider them and determine to what extent they constitute assets. The bankrupt should not take the responsibility of determining this question. That the bankrupt believes it has no cash value is not sufficient excuse for not scheduling a policy. Omitting property on the advice of counsel on the ground that it is part of the bankrupt’s exemption, even if the omission is in good faith, is a ground for denying the discharge.

“The amendatory Act of June 22, 1938, did not change the requirements as to scheduling property in reversion, remainder or expectancy, including property held in trust for the bankrupt, or subject to any power or right to dispose of or to charge. However, Section 70, 11 USCA 110, was amended so as to vest in the trustee certain interests which might vest in the bankrupt within six months of bankruptcy.

Accordingly, qualifying changes have been made in Schedule B-4 in which interests of the kind above set out are required to be listed. The change consists in a requirement that the bankrupt state the location of the property, the name and description of the person now enjoying the same, the value thereof, and from whom and in what manner the bankrupt's interest in such property is or will be derived. * * *

"The rule which requires the bankrupt to list all policies of insurance in order that the court may determine whether or not an interest therein passes to the estate, is paralleled by a similar rule which requires the bankrupt to list all property of every kind which may possibly be comprehended within the wide general terms set forth in Schedule B-4. The bankrupt must not assume to determine whether or not a contingent interest is one that will pass to the trustee of his estate. The form does not distinguish between vested and contingent interests. It is not unusual for a bankrupt to be required to report property which will not vest in the trustee of his estate. Exempt property is an instance. Another is property which passed under an assignment for the benefit of creditors more than four months before the bankruptcy, and another is the requirement in Schedule B-4 that the bankrupt report any interest in remainder, vested or contingent, or in expectancy.

"Where the ownership of the bankrupt is doubtful, and he omits property on the advice of counsel, he may succeed in getting his discharge over objections charging fraudulent concealment. The better course is to list everything in which an antagonistic creditor might claim the bankrupt had any interest, and accompany the listing with a statement of the name of the person whom the bankrupt regards as the owner rather than himself. * * *"

Corpus Juris Secundum seems to be one of Mr. Goldman's favorite text books. In his brief on which he spent fifteen to twenty hours to determine whether the interest in the trust should be scheduled he cites C. J. S. five times, all in volume 8, pages 482, 485, 631, 663, and the 1943 annotations. If he had just turned to page 1413 in volume 8, he would have found the following statement, concerning the omission of items from schedules:

"That the omission was made on advice of counsel does not of itself excuse it."

As authority for the foregoing text the following decisions are cited:

In re Russell, 52 F. (2d) 794;

The Perel, 51 F. (2d) 506;

In re Merritt, 28 F. (2d) 679;

Sinclair v. Butt, 284 F. 568.

Reading further Mr. Goldman would have found the following statement:

"It will be excused for such reason only if it also appears that the bankrupt stated the facts fully to his counsel, and that the advice of the latter was given and acted on in good faith, with regard to a matter of law only. He is not justified in relying on the advice of his attorney with reference to plain, palpable and transparent facts."

We could devote pages to quoting the text of all the various text books on bankruptcy, and the result would be to pile up quotation upon quotation similar to Remington and C. J. S. NOT ONE OF THESE TEXT BOOKS WOULD SUPPORT THE POSITION TAKEN BY MR. GOLDMAN.

IN NO TEXT BOOK OR DECISION AND IN NO PLACE IN THE LAW CAN SUPPORT BE FOUND FOR THE POSITION TAKEN BY MR. GOLDMAN, AND EVERY TEXT BOOK STATES THE LAW CONTRARY TO THE PRINCIPLE THAT MR. GOLDMAN TESTIFIED HE HAD DETERMINED TO BE THE LAW AS A RESULT OF FIFTEEN TO TWENTY HOURS STUDY.

Had Mr. Goldman desired to consider an authority citing decisions, it would not have required but a moment for him to have turned to perhaps the leading Federal authority, U. S. C. A. Bankruptcy, the sections comparing to Sections 14 and 15 of the Act, and found the following decisions:

Pollack v. Meyer Bros. Drug Co., 233 F. 861, where the bankrupt was a beneficiary under a trust in a state court proceeding, which was not listed in his schedules and the defense offered that because the title to the interest in the trust did not pass to the trustee in bankruptcy it need not be described in the schedules, and the court said:

“It is not unusual to require a report of property which cannot be utilized by the trustee. For example, a bankrupt is required to report all the property which he claims as exempt, although all that can be done with it is to set it off to him. Again he is required to report what portion of the bankrupt estate has passed under assignment for benefit of creditors, although if it was more than four months before the bankruptcy, it cannot be recovered by the trustee. Other provisions might be cited but this is sufficient for our purposes. In other words, the rule requires the reporting of much property that may or may not be held by the trustee, that the court may determine its liability for the payment of debts. Such determination is a part of the administration of the

estate. Bearing this in mind, the rules require the bankrupt to report any interest he had in remainder, vested or contingent, or in expectancy, and that he had an interest, either in remainder or expectancy, in this state court trust is beyond dispute.”

Duggins v. Heffron, 128 F. (2d) 546, a decision by this court, where the bankrupt's discharge was denied on the ground he omitted property from his schedules, although the trustee was unsuccessful in his efforts to recover the property, and the defense was offered that the estate did not suffer by the omission—which will undoubtedly be argued here and of which we will have more to say later—and this court said:

“The statute requires a disclosure of all the property of the estate to enable the trustee to investigate any claim so to hold it. It is the duty of the bankruptcy tribunal, or the court in a plenary suit, to pass on the results of the trustee's investigation, and not the privilege of the bankrupt to determine whether the bankrupt may have the benefits of bankruptcy and continue to own any particular property. That the concealment or false statement may not have injured the creditors is irrelevant.”

Also *In re Macfarlane*, 45 F. (2d) 994, this court said:

“In reaching this conclusion, we have assumed that it was the duty of the bankrupt to schedule her interest in the trust estate whether it was subject to administration in the bankruptcy court or not . . .”

What conclusion must be drawn from this startling situation? We submit that it must be that the bankrupt's attorney was not looking for the law on the question, but for an excuse, no matter how flimsy, for omitting the de-

scription of the interest in the trust from the schedules. Can any member of the legal profession avoid pondering with amazement on the colossal gall of this attorney who ignored the plain mandate of Schedule B-4, by-passed all the well known text books on bankruptcy, ignored the text of C. J. S. in the very volume from which he quoted in his brief, and then testified that, in honesty and good faith, he sought to ascertain the law on the subject, and believed that he had found it in the authority for the proposition that because the title to the interest in the trust did not pass to the trustee it need not be described in the schedules, WHEN HIS BRIEF CONTAINED NO AUTHORITY TO THAT EFFECT AND ALL THE LAW IS TO THE CONTRARY?

It was argued in the lower courts and undoubtedly will be here, that no harm was done by the omission of the trust interest from the schedules, because the title did not pass to the trustee, and he could not have taken any action had he known about it, and no one was injured. As this court said in *Heffron v. Duggins, supra*, injury to creditors is irrelevant, and it might have made a great deal of difference if Mrs. Huff had died four days sooner. They intended to conceal the existence of the trust and deceive the court and creditors, in which they were successful for ten months, and only the act of God in preserving Mrs. Huff's life four days longer enabled them to come out in the open and admit the existence of the trust, because they then believed that the trustee could not reach the trust interest.

Subdivision (a)(7) of Section 70 of the Bankruptcy Act, defining property, the title to which passes to the trustee in bankruptcy by operation of law, contains the

following language, which would include the bankrupt's interest in the trust estate if Mrs. Huff had died within six months:

“Contingent remainders, executory devises and limitations, rights of entry for condition broken, rights of possibilities of reverter, and like interests in real property, which were non-assignable prior to bankruptcy and which, within six months thereafter became assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estate;”

The petition in bankruptcy was filed October 16, 1942 [Finding 1, Rec. p. 36]. Edith Huff died April 20, 1943 [Finding V, Rec. p. 39].

What would have happened to this interest in the trust if Edith Huff had died at any time within six months after the filing of the petition? Over ten months was to elapse before the trustee learned of the existence of the trust. The bankrupt would have had ample time to reduce his interest to cash, either by collection or sale. If they did not intend to conceal the trust interest and sneak it away from the creditors, why was it not included in the schedules so that the trustee might have taken action for the protection of the bankrupt estate in the event of the death of the aunt within six months?

Permit us to examine the reason assigned by the referee in his opinion for deciding that the bankrupt and his counsel acted in good faith:

“In this case, however, as soon as the bankrupt and his counsel were confronted by the trustee with the information which he had secured in connection with the interest in the trust, they readily admitted the said interest.” [Rec. p. 33.]

They kept quiet for almost a year—from the date they filed the petition on October 16, 1942, to the date the bankrupt filed his answer to our petition on October 13, 1943, and finally admitted it when they were compelled to answer under oath. What would have been necessary to show bad faith, more perjury? When you catch a burglar decamping with the family silver does he become any less a burglar by admitting that it is the silver he has in his sack?

The manner of this admission is also interesting. Paragraph V of the bankrupt's answer [Rec. p. 10] admits that he had knowledge of the existence of the trust, but also that he had knowledge that he would not be entitled to any property under it until the death of his aunt. THEREFORE HE ADMITS THAT HE KNEW THAT NO PROPERTY WAS HELD IN TRUST FOR HIM.

Note the manner of his denial of the trustee's allegation [Rec. p. 6] that the bankrupt was guilty of concealing assets and a false oath "by stating in Schedule B-4 filed herein that he had no property in reversion, remainder or expectancy, including property held in trust for him or subject to any power or right to dispose of or to charge":

"Alleges that his statement in Schedule B-4, that he had no property subject to any right or power in him to dispose of or to charge, was true; denies that he falsely stated anything in Schedule B-4 or in any other section or portion of his schedules in bankruptcy or in his petition for bankruptcy."

They ignore the allegation concerning property in reversion, remainder or expectancy and property held in trust. Under the rules of pleading, does he not admit that he was guilty of concealment of assets and a false

oath by failing to deny that he stated in his schedules that he had no property in reversion, remainder or expectancy or property held in trust for him?

The Circuit Court of the Eighth Circuit in *Sinclair v. Butt*, 284 F. 568, disagreed with the referee and held that where the bankrupt and his attorney discussed the points involved in the schedules before the schedules were prepared, that the oath was knowingly false. If a false statement was knowingly made there can be no good faith.

Having commenced this bankruptcy proceeding for the purpose of protecting the valuable trust interest, with the idea that Mrs. Huff would die within six months and they would be able to conceal the existence of the trust from the court and creditors, their guilty consciences accused them, and instead of admitting that the purpose of the bankruptcy was the protection of the trust interest, they offered the most ridiculous explanation, as shown by the testimony of the bankrupt's attorney as follows:

“Q. Well, when bankrupt first discussed the filing of this petition in bankruptcy, what reason did he give you for a desire to file a petition? A. He had been in the real estate business and the construction business, and because of the war that business had ceased, you couldn't get any more materials. He had been out of that business at that time for practically a year and a half and was simply eating up his accumulated earnings, trying to keep his office open. Furthermore, he had been inducted, not inducted, but he was taking his medical examination, and he had an obligation to his brother-in-law coming due of many thousands of dollars, and if he went into the army he wanted to feel free and easy about his obligations, and I suggested that under the circumstances he had a right to file bankruptcy.

Q. Did he say anything to you about the fact that his aunt was getting quite old and her health was not any too good, and he had better get this thing cleared up before she died, so the creditors wouldn't grab it?

.
A. The answer is no." [Rec. pp. 103-105.]

Let us take this explanation apart and see how utterly ridiculous it is.

"He had been in the real estate business and the construction business, and because of the war that business had ceased, you couldn't get any more materials."

Did everyone in the real estate and construction business go into bankruptcy because of the war? Real estate activity, as shown by the recordings in the public records, increased tremendously after the commencement of the war. As shown by the building permits issued in Los Angeles County, building construction has been carried on in a large volume since the war commenced. There has been a manpower shortage and a great demand for persons experienced in construction work.

"He had been out of that business at that time for practically a year and a half and he was simply eating up his accumulated earnings, trying to keep his office open."

How would bankruptcy improve that situation? Instead of eating up the accumulated earnings slowly and getting the benefit of them, he would be required to pay them all immediately to the trustee.

Then the statement about being inducted in the army and his desire to feel free about his obligations. No action could be prosecuted against him while he was in the

army. His attorney's statement that under those circumstances he had a right to file bankruptcy. Any citizen possesses such right and he cannot be called upon for explanations of any kind, and no reasons need be given beyond the mere desire.

A bankruptcy proceeding is not a trivial or inconsequential matter. It possesses a stigma in the minds of the general public that induces almost everyone to resort to every possible device to avoid it. It is a proceeding of some little expense.

Of course, if he had a valuable trust estate that he would receive on the death of his aunt, and if she was old and in poor health and might die at any time—and did die in six months and four days—and he wanted to avoid paying his creditors, then a most compelling reason existed for the bankruptcy proceedings. To say that a bankruptcy proceeding would be filed for the trivial reasons Mr. Goldman gave, and that no mention was made of the protection of the trust interest, the only assets of any substantial value that might be jeopardized, is so crudely false that if it had not been prompted by such wicked motives and in such a serious matter, would be laughable. The bankrupt and his attorney undoubtedly discussed the matter many times, and weighed every fact, as only a couple of conspirators could, and reached the conclusion that Mrs. Huff would probably die within six months—they were only four days wrong—and that they could conceal the trust and the estate would be closed and the creditors never learn of its existence. Had they not been conspiring Mr. Goldman would have admitted the obvious, that the protection of the trust estate was the purpose of the bankruptcy proceeding. The murderer avoids talking about where the body is buried.

2. The Bankrupt Was Not Warranted in Relying Upon the Advice of Counsel With Reference to Plain, Palpable and Transparent Facts.

The bankrupt was guilty of a false oath and the concealment of the trust interest which, to say the least, was an asset in which the trustee had a possible contingent interest, and one of which he was entitled to all the information required in Schedule B-4. The bankrupt's conduct was with knowledge and intent, because the very question was discussed by himself and his attorney, but it is excused on the ground that he relied on the advice of counsel. If we assume that the advice of counsel was given in good faith—one of the necessary elements—which we submit would be difficult for even the most credulous, still the advice of counsel cannot be used to shield a bankrupt from the consequences of frauds and crimes when the question involved is plain and transparent, a question of fact only and in no sense a question of law.

In re Breitling, 133 F. 146 (C. C. A. 7):

“If it be doubtful whether a specific item of property should go to creditors or be reserved by the bankrupt, it is not for him to constitute himself the judge, concealing the fact, but it is his duty to disclose the transaction, that the bankrupt court may determine the right. *In re Gailey*, 62 C. C. A. 336, 127 Fed. 538.”

Sinclair v. Butt, 284 F. 568 (C. C. A. 8):

“It is admitted in argument that the oath of the bankrupt was knowingly false. The testimony of the bankrupt and his attorney is to the effect that the very points involved were discussed by them before the schedules were made out. * * *

“The bankrupt must be held to have intended the natural and necessary consequences of his own acts. He is not warranted in relying upon the advice of counsel with reference to plain, palpable and transparent facts. It was not within the province of the bankrupt and his counsel to say that the amount involved was small and that therefore it would be properly disregarded. In *re Breitling*, 133 F. 146, 66 C. C. A. 212.”

In re Perel, 51 F. (2d) 506:

“It is also true that the advice of counsel on a ‘plain, palpable and transparent fact’ (*In re Breitling* (C. C. A.) 133 Fed. 146) that is, as here, that property which he owns without dispute or question does not have to be scheduled, is not a defense (*In re Merritt* (C. C. A.) 28 F. (2d); *Sinclair v. Butt* (C. C. A.) 284 F. 568).”

3. While the Provisions of the Trust Prohibited Alienation and Levy by Creditors During Its Existence, It Terminated Upon the Death of Edith Huff, and the Bankrupt Could Have Assigned His Interest at Any Time, Effective as of the Date of the Termination of the Trust, and Therefore the Title to the Bankrupt's Interest Passed to the Trustee, Effective as of the Date of the Termination of the Trust.

Section 70a (5) of the Bankruptcy Act, in defining property, the title to which passes to the trustee by operation of law upon the filing of the petition in bankruptcy, provides:

“Property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered . . .”

Finding III [Rec. pp. 36-39] sets forth the provisions of the declaration of trust material to this proceeding, the effect of which is that the beneficiaries cannot alienate their interests in the trust “during the entire term thereof”, nor are such interests subject to the claims of creditors, and the trust terminates upon the death of Edith Huff.

The doctrine of non-assignability of interests in property has in recent decisions been seriously questioned and frequently denied. The tendency is to do away with restraints upon the power to assign. Such tendency is well illustrated by the following cases.

M. Witmark & Son v. Fred Fisher Music Company, 125 Fed. (2d) 949 (C. C. A. 2);

Kelley v. Kelley, 11 Cal. (2d) 356.

In *Witmark v. Fisher, supra*, the court had under consideration the right to renew a copyright by the assignees of the author of the publication. After discussing the provisions of the Act of Congress which it was contended prohibited the assignment, the court said:

“This conclusion is reinforced by the history of judicial disapproval of restraints on assignability. Thus lawyers discovered a way around the archaic rule against assignment of choses in action, courts of equity supported them directly and courts of law winked at the result. Cook, op. cit. *supra*. Equally familiar are the general rules against restraints on alienation of property. There may be mentioned, also, the unsuccessful attempts of employers to prevent wage assignments and the consequent specific legislation forbidding or regulating such assignments. One such statute was even declared unconstitutional. *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152, 28 L. R. A., N. S., 1108, 130 Am. St. Rep. 234; see, generally, Fortas, Wage Assignments in Chicago, 42 Yale L. J. 526. And there is the unusual case of an unenforceable assignment of an interest under a spendthrift trust being enforced by the pleasant fiction of calling it a ‘contract to assign,’ with the amount assigned as the measure of damages. *Kelly v. Keliy*, 11 Cal. 2d 356, 79 P. 2d 1059, 1064, 119 A. L. R. 71; 48 Yale L. J. 666. Further, there is our own recent holding that an assignment of an expectancy under a will is valid. *In re Barnett, supra*; 3 Restatement, Property, Sec. 316; and so generally of contingent interests in modern law, 2 Restatement, Property, Sec. 162. Our society still rests on the theory that men can ordinarily make free disposition of their property rights.”

In *Kelley v. Kelley*, *supra*, the Supreme Court of California sums up the law of California on the subject and holds that to permit beneficiaries under such a trust to alienate their interests, or to permit levies thereon by creditors would do violence to the intent of the trustor, but said:

“An assignment by the beneficiary in the nature of a promise to pay or turn over trust property when received by him, is not wholly void.”

The test of whether title passes to the trustee is whether or not it is property “which the bankrupt could by any means have transferred.” The defendant in *Kelley v. Kelley* effectively transferred his interest, because the Supreme Court awarded the plaintiff a judgment for the amount involved. The bankrupt relies on the rule laid down in *Kelley v. Kelley* to the extent that it holds that the trust interest is not assignable or subject to levy, but denies its application when it would result in allowing the trustee the same relief the plaintiff received in that case.

The trust only prohibited assignments “during the entire term thereof”, and an assignment that did not become effective until the termination of the trust, would not be an assignment made “during the entire term thereof”, because the assignment would not be made until the trust had terminated. Therefore, on the date of the filing of the petition in bankruptcy, the bankrupt could have assigned the trust interest to a trustee for the benefit of his creditors effective as of the date of the termination of the trust, and such assignment would have been effective, and therefore the title to the trust interest passed by operation of law to the trustee in bankruptcy.

4. **Even if the Title Did Not Pass to the Trustee, the Trustee Is in the Position of the Most Favored Creditor and Is Entitled to the Same Equitable Relief That Was Given the Plaintiff in *Kelley v. Kelley*.**

The referee and counsel for the bankrupt conceded at the hearing of this matter that had the trustee, for instance, advanced money to the bankrupt prior to the filing of the petition and taken an assignment of the trust interest as security, he would have been entitled to the same relief that the California Supreme Court gave the plaintiff in *Kelley v. Kelley*. The trustee is in the position of the most favored creditor, and if a creditor for an immediate consideration is entitled to equitable relief, why could not the bankrupt, in consideration of forbearance, for instance, which is as good as any other consideration, have assigned his interest in the trust estate to an assignee for the benefit of his creditors? Such an assignment would have been in the same category as that made in *Kelley v. Kelley* which was held effective in practical effect by the Supreme Court of California. In applying the definition "which the bankrupt could by any means have transferred", it is presumed that the bankrupt took every action within his power to effect the assignment. To deny the trustee at least the same relief that was given the plaintiff in *Kelley v. Kelley*, will be to set aside the rule long recognized in bankruptcy, that the trustee is in the position of the most favored creditor, and reduce the

trustee to a subordinate position that was never intended by Congress in the adoption of the Bankruptcy Act.

We respectfully submit that by the decision of the lower courts the creditors of this bankrupt estate have been done a great injustice, and that the order should be reversed on all grounds.

Respectfully submitted,

EARL E. MOSS and
LOUIS LOMBARDI,

By EARL E. MOSS,

Attorneys for Appellant.

No. 10792.
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HARRY ASHTON, as Trustee in Bankruptcy of the Estate
of Charles Ralph Sentney,

Appellant,

vs.

CHARLES RALPH SENTNEY,

Appellee.

BRIEF OF RESPONDENT CHARLES RALPH
SENTNEY.

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PAUL P. O'BRIEN

TOPICAL INDEX.

	PAGE
Statement of facts.....	1
Findings of fact, conclusions of law and order.....	1
Argument and authorities.....	12

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Barry, In re, No. 43814, District Court, E. D. New York. Oct. 2, 1943, 52 Fed. Supp. 492.....	34
Brietling, In re, 133 Fed. 146.....	40
Canfield v. Security First National Bank, 8 Cal. App. (2d) 277, and 13 Cal. (2d) p. 1.....	28
Crockanthorp v. Sickles, 156 App. Div. 753, 141 N. Y. Supp. 370	17
Curtin v. Kowalsky, 145 Cal. 431.....	28
Dudley, Jr., v. Tucker, 6 A. B. R. (N. S.) 95.....	23
Duggins v. Heffron, 128 Fed. (2d) 546.....	40
Eaton v. Boston Safe Deposit & Trust Company, 240 U. S. 427, 36 A. B. R. 701.....	20, 29
Farmers Savings Bank, et al. v. Anton, 1 Fed. (2d) 103.....	38
First National Bank & Trust Company of Elmira, In the Mat- ter of, 34 A. B. R. (N. S.) 806.....	20, 21, 24
Glann, Estate of, 177 Cal. 347.....	23
Horton v. Moore, 42 A. B. R. (N. S.) 485.....	22
Kelly v. Kelly, 11 Cal. (2d) 356.....	27, 41
MacFarlane, In re, 45 Fed. (2d) 994.....	38
McColgan v. Magee, Inc., 172 Cal. 182.....	27
McHarry, In re, 7 A. B. R. 83; 111 F. 498.....	24
Moore, Matter of, 10 A. B. R. (N. S.) 568.....	22
Newlove v. Mercantile Trust Company of San Francisco, 156 Cal. 657	23, 27
Nichols v. Eaton, 91 U. S. 716.....	20
Nichols v. Emery, 109 Cal. 323.....	17
Noonan v. State Bank of Livermore, 20 A. B. R. (N. S.) 642	21, 23
Pearsall v. Great Northern Railway Co., 161 U. S. 646.....	30

	PAGE
Perel, In re, 51 Fed. (2d) 506.....	39
Pollock v. Meyer Bros. Drug Co., 233 Fed. 861.....	40
Ritzman, Estate of, 186 Cal. 567.....	23
Schute case, 38 Fed. (2d) 769.....	39
Shenberger, In re, 4 A. B. R. 487; 102 F. 978.....	24
Sinclair v. Butt, 284 Fed. 568.....	39
Sinclair v. Crabtree, 211 Cal. 524.....	24
Soroko, Matter of, 53 A. B. R. (N. S.) 223.....	32
St. John, In the Matter of, 105 F. 234.....	21, 24
Tennant v. John Tennant Memorial Home, 167 Cal. 570.....	17
Title Ins. & Trust Co. v. Duffill, 191 Cal. 629.....	23, 28
Twaddell, In re, 6 A. B. R. 539; 110 F. 145.....	24
Wetmore, In re, 108 F. 520, Third Circuit (Penn.).....	17
Wood, In re, 3 A. B. R. 572, 98 F. 972.....	24
Woods v. Little, 13 A. B. R. 742; 134 F. 229.....	24
Wyche, In re, 51 Fed. Supp. 825.....	32

STATUTES.

Bankruptcy Act, Sec. 15.....	31
Bankruptcy Act, Sec. 28.....	22
Bankruptcy Act. Sec. 30.....	22, 30
Civil Code, Section 699.....	24
Civil Code, Sec. 767.....	21
Civil Code, Sec. 769.....	21
Civil Code, Sec. 2280.....	17

TEXTBOOKS.

California Jurisprudence, Sec. 70a(5).....	28
California Jurisprudence, Sec. 70a(7).....	29
California Jurisprudence, Sec. 70a(8).....	29, 30
22 California Jurisprudence, Sec. 1.....	18

	PAGE
22 California Jurisprudence, Sec. 3.....	18
22 California Jurisprudence, Sec. 10.....	19
22 California Jurisprudence, Sec. 11.....	19
22 California Jurisprudence, Sec. 13.....	19
22 California Jurisprudence, Sec. 14.....	19
22 California Jurisprudence, Sec. 21.....	20
25 California Jurisprudence 149.....	17
25 California Jurisprudence 173.....	28
25 California Jurisprudence 174.....	28
4 California Law Review, 426.....	27
8 Corpus Juris Secundum, p. 1413.....	35
8 Corpus Juris Secundum, 1412, Sec. 519a(2).....	35
8 Corpus Juris Secundum, 1412, Sec. 519(3).....	36

No. 10792.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY ASHTON, as Trustee in Bankruptcy of the Estate
of Charles Ralph Sentney,

Appellant,

vs.

CHARLES RALPH SENTNEY,

Appellee.

BRIEF OF RESPONDENT CHARLES RALPH SENTNEY.

Statement of Facts.

We, as did the District Judge, adopt the Findings of the Referee as the facts. They are and we quote:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

“The trustee herein, having filed his petition seeking an order vacating and setting aside the discharge of the bankrupt, and also having filed his petition seeking an order requiring the bankrupt to turn over to the trustee, as an asset of the estate, the interest of the bankrupt and the inheritance of the bankrupt under a trust known as Trust No. 245, The First National Bank of Santa Ana, California, Trustee, and the bankrupt having filed his answers to said petitions and the returns to the orders to show cause issued thereon, and the matters having come on regularly for hearing before the Referee in Bank-

ruptcy, the trustee being personally present and represented at said hearing by his counsel, Earl E. Moss, Esq. and Louis Lombardi, the bankrupt being represented by his counsel, Rupert B. Turnbull and Martin Goldman, and the First National Bank of Santa Ana, California, being represented by A. M. Bradley, Esq., its attorney, and evidence, oral and documentary, having been introduced by the parties, and it having been stipulated by counsel for the respective parties that all the evidence offered might be considered as evidence on each of the petitions and orders to show cause, and the matters having been submitted to the Referee on briefs, and the respective parties having filed heir briefs, and the same having been considered by the Court, the Court now makes its Findings of Fact with respect to the trustee's seeking order revoking the discharge of the bankrupt. The Court finds, with respect to [139] the petition of the trustee seeking an order revoking the discharge of the bankrupt, as follows:

I.

That on the 16th day of October, 1942, the above-named bankrupt filed in the above-entitled court a voluntary petition in bankruptcy, duly signed by him and verified before a notary public, and on said date an order of adjudication was duly entered.

II.

That on the 4th day of November, 1942, Harry Ashton was duly appointed Trustee in Bankruptcy of the estate of said bankrupt and thereafter qualified as such trustee and ever since has been and now is the duly appointed, qualified and acting trustee of the estate of said bankrupt.

III.

That on the said 16th day of October, 1942, there was in existence a certain trust known as Trust No. 245, created by W. A. Huff and Edith Huff as trustors, and the First National Bank of Santa Ana, as trustee, and on said date the bankrupt was one of the beneficiaries therein. That said trust contained, among others, the following provisions:

“Each and every beneficiary under this trust is hereby restrained from, and shall be without right, power and/or authority to sell, transfer, pledge mortgage, hypothecate, alienate, anticipate, or in any other manner affect or impair his or her beneficial and/or legal rights, titles, interests, claims and/or estates, in and/or to the income and/or principal of this trust during the entire term thereof, nor shall the rights, titles, interests, and/or estates of any beneficiary hereunder be subject to the rights or claims of the creditors of any beneficiary nor subject nor liable [140] to any process of law or Court upon the claim of any such creditor, and all the income and/or principal under this trust shall be transferable, payable and/or deliverable, only, solely, *exclusively*, and personally to the herein designated beneficiaries, or their lawful guardian or guardians hereunder at the time they are entitled to take the same under the terms of this trust, and the personal receipt of the designated beneficiary hereunder, or their lawful guardian, shall be a condition precedent to the payment or delivery of the same by said Trustee.

“12.

“The said Trustors herein named reserve to themselves the exclusive possession and use and enjoyment in, and all rights to, the rents, issues and profits

of all the property herein set forth in Exhibit "a", and all other properties that may be hereafter transferred, assigned, set over or *conveyed* to the Trustee, and each of said properties, for and during the term of the natural lives of both of said Trustors herein named; and it is further understood that this trust, being gratuitously created by said Trustors hereinbefore named, the right and power is hereby reserved unto said Trustors to revoke or amend this trust, in whole or in part, at any time, at their pleasure, during the lives of both of said Trustors, by request in writing addressed and delivered to said Trustee; and the Trustors further reserve the right to revoke any or all of said transfers, assignments or conveyances as to any of the property in Exhibit 'A' described, [141] or any other property which may be transferred, assigned or conveyed to said Trustee under this trust, . . ."

and an amendment to the Declaration of Trust executed on August 3, 1935, after mentioning a number of beneficiaries, contains the following:

"After payment of the funeral expenses, expenses of last illness and legal debts of the trustor, Edith Huff, together with the payments of the sums provided in subdivisions "First" to "Seventh", both inclusive, the balance of said one-half of the entire trust estate then remaining in the hands of the trustee shall be distributed, disposed of and handled in the following manner:

"An equal one-third share of said portion of the trust estate then remaining shall be distributed to Bernice Lutz, niece of said trustor, Edith Huff. Should said Bernice Lutz be not surviving at the death of said Edith Huff, but be survived by bodily

issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to said bodily issue per stirpes. Should said Bernice Lutz not be surviving and not be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to Ralph Sentney, brother of said Bernice Lutz, and should said Ralph Sentney be not surviving at said time, then one-fourth of said portion of said estate so to be distributed to Bernice Lutz shall be distributed to William Arthur Lutz, the husband of said Bernice Lutz, and the balance of said portion of said estate [142] shall become a part of the trust estate' ", etc.

" 'An equal one-third share of said portion of the trust estate then remaining shall be distributed to Ralph Sentney, nephew of said Edith Huff. Should Ralph Sentney be not surviving at the date of death of said Edith Huff, but be survived by bodily issue, then that portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the bodily issue of said Ralph Sentney per stirpes. If, however, said Ralph Sentney be not surviving and not be survived by bodily issue, then said portion of said estate shall be distributed to Bernice Lutz, the sister of said Ralph Sentney, and should said Bernice Lutz be not surviving at said time, and should said Ralph Sentney be not survived by bodily issue, then one-half of said portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the wife of said Ralph Sentney, if he is married, and said wife is living with him and no proceedings for divorce or separate maintenance be pending between them at the time of the death of said Ralph Sentney,' " etc.

IV.

That Charles Ralph Sentney, the bankrupt herein, and Ralph Sentney mentioned in said trust are one and the same person.

V.

That the surviving trustor in said trust, said Edith Huff, the aunt of the bankrupt, died on April 20, 1943, more than six months after the date of adjudication herein.

VI.

That Schedule B-4 of the schedules in bankruptcy, signed [143] and verified by the bankrupt and attached to his petition in bankruptcy herein is as follows:

Harry Ashton, as Trustees, etc. v. Sentney.

Schedule B-4

Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.

(N. B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as know to the debtor.)

General Interest	Particular Description	Estimated value of Interest
		<hr/>
Interest in Land		Dollars Cents
None		

Personal Property		
None		

Property in Money, Stock, Shares, Bonds, Annuities, etc.		
None		

Rights and Powers, Legacies and Bequests		
None		
	Total	<hr/> None

VII.

That no mention was made by said bankrupt at any place in said schedules, or his statement of affairs filed concurrently therewith, of the existence of said trust. That the bankrupt, for many [144] years prior to said 16th day of October, 1942, knew of the existence of said trust and the provisions thereof. That shortly prior to the filing of the petition herein, the bankrupt procured a copy of the Declaration of Trust with the amendments thereto, and submitted the same to Martin Goldman, his attorney in this proceeding, and said Martin Goldman prepared a brief to determine whether or not the law required the bankrupt to describe said interest in said trust in the schedules in bankruptcy, which said brief consists of the first three pages of "Trustee's Exhibit 2" in this proceeding. That both before and after the preparation of

said brief, the said bankrupt and his said attorney, Martin Goldman, discussed in detail the question of the necessity of describing said interest in said trust in the schedules in bankruptcy. That after making said search of the law and preparing a brief thereon, said Martin Goldman advised the bankrupt that there was no property right in said trust which should, or ought to be, described in said schedules.

VIII.

That at the first meeting of the creditors of said bankrupt, held on the 4th day of November, 1942, the said bankrupt testified as a witness and did not reveal the existence of said trust and his interest therein.

IX.

That an order was made by the above-entitled court on the 9th day of December, 1942, granting said bankrupt a discharge; that neither the trustee of said bankrupt's estate nor the creditors thereof, nor the court knew of the existence of said trust prior to about the first day of September, 1943. That on October 7, 1943, the trustee of said bankrupt's estate filed a petition for an order revoking the bankrupt's discharge.

From the foregoing findings of fact, the court makes the following conclusions of law:

I.

That at the date of the filing of the petition in bank- [145] ruptcy, and for a period of six months continuously thereafter, and for a period of six months after the adjudication of bankruptcy herein, and during all of said times, the bankrupt had no property interest in Trust No. 245, the First National Bank of Santa Ana,

Trustee, which the bankrupt could by any means have transferred, and that there was no property in said Trust which could or did pass by operation of law to Trustee in bankruptcy.

II.

That the interest of the bankrupt in the said trust, as above set forth on the date of the filing of the petition in bankruptcy, should have been described by the bankrupt in Schedule B-4 of his schedules in bankruptcy, regardless of the fact that the interest did not pass to the Trustee.

III.

That the bankrupt was not guilty of any bad faith or concealment of assets or knowingly or intentionally making a false oath.

IV.

That the petition of the trustee for an order revoking the discharge of the bankrupt should be denied and said petition dismissed.

Findings of fact with respect to the petition of the trustee for an order to show cause requiring an order declaring that the estate of the bankrupt and the trustee are the owners of a beneficial interest in Trust No. 245, First National Bank of Santa Ana, California:

I.

The Court finds it is not true that at the time of the filing of bankrupt's petition herein, on the date of the adjudication in bankruptcy of the bankrupt herein or at any time during the six months' period immediately succeeding the adjudication of the bankrupt herein, or at any of said times the bankrupt had any property interest as the beneficiary or otherwise in Trust No. 245, the

First National Bank of Santa Ana, California, Trustee, which he, the bankrupt, could have by any means transferred, or which pass by operation of law to [146] Trustee in bankruptcy.

II.

The Court finds that there was a Trust created by W. A. Huff and Edith Huff during their lifetime with the First National Bank of Santa Ana, as Trustee, known as Trust No. 245; that said Trust was a Spendthrift Trust with the absolute right in the donors or one of the donors on the death of the other to change and vary the terms thereof.

III.

The Court finds that the trustee in bankruptcy, on the date of the commencement of this proceeding, and for six months thereafter, did not acquire any right, title or interest as an asset in the within bankrupt estate in said trust, and the court further finds that, under the provisions of Section 70 (A) 5 of the Bankruptcy Act, the said interest of the bankrupt in said trust was not such property right as would be vested in the trustee.

From the foregoing findings of fact, the court makes the following conclusions of law:

I.

That the petition of the trustee for an order determining that the First National Bank of Santa Ana, California, and the bankrupt herein should be required to convey to the trustee in bankruptcy the bankrupt's alleged beneficial interest in said Trust No. 245 should be denied.

II.

The Court concludes that Harry Ashton, Trustee in bankruptcy herein is not the owner of the bankrupt's beneficial interest in Trust No. 245, or any proceeds which he may ultimately recover therefrom, either as an heir-at-law of Edith Huff or an ultimate beneficiary under the terms of the Trust No. 245, as created by W. A. Huff and Edith Huff, donors, with the First National Bank of Santa Ana, California, Trustee, known as Trust No. 245.

It Is Therefore Ordered as Follows:

That the petition of the Trustee for an order vacating [147] and setting aside the discharge of the bankrupt be and hereby is denied.

That the petition of Trustee, Harry Ashton, herein for an order determining that the bankrupt and the First National Bank of Santa Ana, California, have no interest in Trust No. 245, and that the same be conveyed to the Trustee, Harry Ashton, be, and hereby is denied, and the order to show cause issued on said petition is dismissed.

That the petition of the Trustee, Harry Ashton, seeking the determination, that he as Trustee in bankruptcy herein is entitled to the beneficial interest and any and all beneficial interests in bankruptcy in Trust No. 245, be and hereby is denied, and

It is determined, concluded and found that the estate of the bankrupt and the Trustee thereof, have no right, title or interest in said Trust No. 245 or any of the property thereof.

Dated this 24th day of January, 1944.

Hubert F. Laugharn
Referee in Bankruptcy."

Argument and Authorities.

The attorneys for the bankrupt and appellee prepared carefully the authorities in this matter and these authorities are reviewed in the order of December 6, 1943, of the Honorable Hubert F. Laugharn, Referee in Bankruptcy. That order together with the authorities we present is our argument in support of the order appealed from. It follows:

ORDER.

“The debtor’s voluntary Petition in Bankruptcy, Schedules and Statement of Affairs were filed herein on October 16, 1942, on which date he was adjudicated a voluntary bankrupt.

On the date of his adjudication there was in existence a certain Trust No. 245 created by W. A. Huff and Edith Huff as Trustors and The First National Bank of Santa Ana, California, as Trustee. The Declaration of Trust set forth the within bankrupt as one of the beneficiaries.

The pertinent provisions of the trust which have a bearing upon the determination of the within problem are the following:

“11.

“Each and every beneficiary under this trust is hereby restrained from, and shall be without right, power and/or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate, or in any other manner affect or impair his or her beneficial and/or legal rights, titles, interests, claims and/or estate in and/or to the income and/or principal of this trust during the entire term thereof, nor shall the rights, titles, interests, and/or estates of any

beneficiary hereunder be subject to the rights or claims of the creditors of any beneficiary nor subject nor liable to any process of law or Court upon the claim of any such creditor, and all the income and/or principal under this trust shall be transferable, payable and/or deliverable, only, solely, exclusively, and personally to the herein designated beneficiaries, or their lawful guardian or guardians hereunder at the time they are entitled to take the same [121] under the terms of this trust, and the personal receipt of the designated beneficiary hereunder, or their lawful guardian, shall be a condition precedent to the payment or delivery of the same by said Trustee.

“12.

“The said Trustors herein named reserve to themselves the exclusive possession and use and enjoyment in, and all rights to, the rents, issues and profits of all the property herein set forth in Exhibit ‘A’, and all other properties that may be hereafter transferred, assigned, set over or conveyed to the Trustee, and each of said properties, for and during the term of the natural lives of both of said Trustors herein named; and it is further understod that this trust, being gratuitously created by said Trustors hereinbefore named, the right and power is hereby reserved unto said Trustors to revoke or amend this trust, in whole or in part, at any time, at their pleasure, during the lives of both of said Trustors, by request in writing addressed and delivered to said Trustee; and the Trustors further reserve the right to revoke any or all of said transfers, assignments or conveyances as to any of the property in Exhibit ‘A’, described, or any other property which may be transferred, assigned or conveyed to said Trustee under this trust, . . .”

and an amendment to the Declaration of Trust executed on August 3, 1935, after mentioning a number of beneficiaries, contains the following:

“‘After payment of the funeral expenses, expenses of last illness and legal debts of the trustor, Edith Huff, together with the payments of the sums provided in subdivisions ‘First’ to ‘Seventh’, both inclusive, the balance of said one-half of the entire trust estate then remaining in the hands of the trustee shall be distributed, disposed of and handled in the following manner:

“‘An equal one-third share of said portion of the trust estate then remaining shall be distributed to Bernice Lutz, niece of said trustor, Edith Huff. Should said Bernice Lutz be not surviving at the death of said Edith Huff, but be survived by bodily issue, then [122] said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to said bodily issue per stirpes. Should said Bernice Lutz not be surviving and not be survived by bodily issue, then said portion of said estate so to be distributed to said Bernice Lutz shall be distributed to Ralph Sentney, brother of said Bernice Lutz, and should said Ralph Sentney be not surviving at said time, then one-fourth of said portion of said estate so to be distributed to Bernice Lutz shall be distributed to William Arthur Lutz, the husband of said Bernice Lutz, and the balance of said portion of said estate shall become a part of the trust estate’”, etc.

“‘An equal one-third share of said portion of the trust estate then remaining shall be distributed to Ralph Sentney, nephew of said Edith Huff. Should Ralph Sentney be not surviving at the date of death of said Edith Huff but be survived by bodily issue, then that portion of said estate so to be distributed

to said Ralph Sentney per stirpes. If, however, said Ralph Sentney be not surviving and not be survived by bodily issue, then said portion of *of* said estate shall be distributed to Bernice Lutz, the sister of said Ralph Sentney, and should said Bernice Lutz be not surviving at said time, and should said Ralph Sentney be not survived by bodily issue, then one-half of said portion of said estate so to be distributed to said Ralph Sentney shall be distributed to the wife of said Ralph Sentley, if he is married, and said wife is living with him and no proceedings for divorce or separate maintenance be pending between them at the time of the death of said Ralph Sentney,' " etc.

Charles Ralph Sentney, the within bankrupt, and the "Ralph Sentney" referred to hereinabove are one and the same.

The said trustor, Edith Huff, the aunt of the bankrupt, died on April 20, 1943, which date was more than six months after the date of adjudication herein.

The schedules of the bankrupt contain no reference to the interest of the bankrupt in the said trust, although it appears that [123] at the time of the preparation and filing of his schedules he had full knowledge of the said interest.

The Order of Discharge was made herein on December 9, 1942.

On October 7, 1943 the trustee filed herein a petition for an order revoking the discharge and a petition for an order requiring the bankrupt to show cause why the trustee should not be determined to be the owner of the bankrupt's beneficial interest in the said trust. Orders to

Show Cause were issued upon the filing of the said petitions and upon the hearing thereon evidence both oral and documentary was introduced by the respective parties.

Passing for later consideration the effect of the "spendthrift" and non-assignability provisions of the said Declaration of Trust, we shall consider the nature of the interest and estate of the bankrupt as of the date of his adjudication in bankruptcy.

The bankrupt was named to receive distribution of two separate interests:

(1) One-third share of the remaining portion of the trust which was to go to Bernice Lutz, the bankrupt's sister and the niece of the trustor, and should the said niece not be surviving at the death of the said Edith Huff and not be survived by bodily issue, then the said portion was to be distributed to the bankrupt should he be surviving at the time.

(2) An equal one-third portion of the remaining trust estate to the bankrupt should he be surviving at the date of death of said Edith Huff.

Bernice Lutz, the bankrupt's sister, was surviving at the date of death of the said Edith Huff and therefore we need give no further concern to the said first interest.

The bankrupt was surviving at the date of death of the said Edith Huff. His said interest which we are now considering was subject to

(1) The right of the trustor to revoke, change or eliminate altogether the beneficial interest of the bankrupt. This she did not do. While the exercise of this right could well have reduced, enlarged or entirely

eliminated the interest of the bankrupt, the trust was not destroyed by the said reservation.

California Jurisprudence "Trustee", Volume 25, at Section 149:

"The individual, in conveying or transferring property in trust, may properly reserve a power of revocation; nor is the trust destroyed by such a reservation . . .

The provisions of the trust instrument remain operative until the power is exercised."

In fact, unless the trust is expressly made irrevocable by appropriate terms in the declaration, the same is now by statute revocable by the trustor. (Civil Code, Section 2280.)

A grantor may reserve in a deed a right to revoke. Such reservation is not prohibited by law. (*Tennant v. John Tennant Memorial Home*, 167 Cal. 570.)

A trust containing power of revocation is good until acted upon. (*Nichols v. Emery*, 109 Cal. 323.)

Likewise, if a trust contains the power of appointment, the particular interests created stand unless the power is used. (*In re Wetmore*, 108 F. 520, Third Circuit (Penn.); *Crockanthorp v. Sickles*, 156 App. Div. 753, 141 N. Y. Supp. 370.)

Therefore, we may disregard the point (1) above, raised by the bankrupt, that he had no interest for the reason that the same might be changed or eliminated altogether by the act of the trustor.

(2) The interest of the bankrupt would be defeated should he predecease his aunt.

A perplexing problem is presented when we seek to name and define the interest and estate of the bankrupt.

22 Cal. Jur., "Remainders and Reversions":

"Sec. 1. 'Remainder' — 'Executory Interest' — 'Conditional Limitation.'—In respect of the time of their enjoyment, estates or interests in property are either present or future. A future estate which is limited to commence upon the expiration of a preceding or primary estate is designated as an estate or interest in remainder; . . ."

"Sec. 3. 'Vested' and 'Contingent' Estates and interests.—Referring to the nature of future estates, it has been said with much truth that 'there is no subject of the law more abstruse or in which greater refinement of learning has been displayed.' The Civil Code classifies such estates and interests as being either 'vested' or 'contingent', and supplies general definitions as to the meaning of these terms; but it is to be noted that the words in question are in common use in several branches of the law, and that their meaning is varied by the particular legal right or situation to which they are applied. The words have no meaning which is common to all situations; and much confusion of thought and misunderstanding has resulted from an assumption that they have a definition which is of universal application. In respect of the creation and attributes of future estates, the terms 'vested' and 'contingent' are employed in the law of perpetuities to denote alienability and inalienability, and in the law of deeds and wills to describe interests which are descendible, devisable and alienable, and those which have not this quality. In these connections the words in question have reference to ownership as being dependent upon the survival of the person who is named as the taker of the

future estate or interest. If ownership is dependent upon survival, the estate is contingent; if ownership is not dependent upon survival, the estate is vested."

'Sec. 10. Provision for Defeasance—Revocation by Grantor. In creating a future estate or interest the owner of the property may provide for its defeasance; nor is the estate invalidated merely because it is defeasible. Accordingly, it is held that a deed of an estate in remainder is not to be held valid by reason of the fact that it contains a clause reserving to the grantor a power to revoke the grant. But the individual, by the creation of future estates which are limited to take effect at the termination of a beneficial life estate in himself, may preclude himself to revoke the trust and destroy the future estates. Nor is it material whether the future estates are 'vested' or 'contingent' in any of the senses in which these terms are used."

"Sec. 11. The law recognizes a right in the individual to create future estates or interest which are conditional or contingent, . . ."

"Sec. 13. . . . Furthermore although the estate is contingent upon the survival of the person who is named as taker, it is considered to be alienable and subject to the claims of creditors. The assignee or creditor becomes substituted for the designated person, and his right to the property is dependent upon such person's survival at the time when the estate is limited to take effect in possession or enjoyment. . . ."

"Sec. 14. Breach of Condition or Happening of Contingency. Being limited to take effect upon the happening of a contingent event, or upon nonperformance of a lawful condition by the taker of the primary estate, the future estate or interest becomes

vested in ownership upon the occurrence of the event”

“Sec. 21. . . . It has long been settled, however, that an estate is descendible, devisable and alienable, although possession of the property may be postponed until a future time,—and although it is subject to being cut off or defeated by the occurrence of a contingent event or situation. The statute provides that ‘future interests pass by succession, will and transfer, in the same manner as present interest.’ . . . But the law does not recognize as an estate or interest ‘a mere possibility’ that a person may acquire property,—such as the expectancy of an heir apparent,—and the ‘possibility’ or expectation of ownership is deemed not to be a subject of transfer or alienation.”

The nature and extent of the interest is to be determined by California statutes. (*Eaton v. Boston Safe Deposit & Trust Company*, 240 U. S. 427; 36 A. B. R. 701; *Nichols v. Eaton*, 91 U. S. 716.)

The interest here is obviously more than a plain expectancy or a possibility and it cannot be considered in the same status as the hope of an heir to inherit by will or succession where there has been no death at the time of bankruptcy. (*In the Matter of First National Bank & Trust Company of Elmira*, 34 A. B. R. (N. S.) 806.)

The argument of counsel for the bankrupt that the interest is a mere expectancy such as the right of a beneficiary under an insurance policy where the insured is still living, is not applicable here.

“. . . a possibility, a hope of an heir of a person still living, or of a beneficiary under an insurance policy which is subject to change of beneficiary, does

not pass to the trustee in bankruptcy. Such interests are not property.” (*Matter of First Nat. Bank & Trust Co.*, 34 A. B. R. (N. S.) 806, at 810.)

The interest, even though contingent, and in that sense not “vested”, being an interest to be received in possession upon the death of the testator, would pass to the trustee. (*Noonan v. State Bank of Livermore*, 20 A. B. R. (N. S.) 642.)

The interest in question is a future estate. Civil Code Sec. 767:

“A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.”

Likewise, it is a remainder interest. Civil Code Sec. 769:

“When a future estate . . . is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.”

and a remainder estate may be limited upon the happening of an event as here upon the demise of the said Edith Huff within the lifetime of the bankrupt.

Assuming that the Declaration of Trust did not contain the “spendthrift” and “nonassignment” provisions, the trustee would then take the said interest of the bankrupt; and this is so even though the trustor might revoke the interest or the bankrupt might predecease the trustor.

In the Matter of St. John, 105 F. 234 (District Court of New York), property was given to trustees, the income to the daughter for life, the principal on her death

to be divided between her children; if none surviving her, between testator's two sons. The daughter was still alive upon the bankruptcy of one of the sons. The bankrupt contended that the interest was a contingent remainder dependent upon two contingencies: (1) if the daughter left survivors, and (2) upon the bankrupt's surviving the sister. The court held that the interest of the bankrupt passed to his trustee, the case determining that the interest of the bankrupt is an expectant estate. The bankrupt's estate is a future estate limited to commence in possession at a future time, on the death of the daughter and on the contingency that she die without child surviving. Section 28 (New York): "Where a future estate is dependent on a precedent estate, it may be termed a remainder"; and Section 30 holds a remainder vested "where there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." The Court stated:

"The fact that the possession of the estate depends upon a future contingency which may never happen, although it lessens materially the value of the estate, does not destroy its character as a vested interest which passed to the trustee."

Likewise, under the Michigan law the expectant interest of the bankrupt in corpus funds, although contingent upon bankrupt's survival of life beneficiary vests in the trustee. (*Horton v. Moore*, 42 A. B. R. (N. S.) 485).

Such interest likewise passes in Maryland. (*Matter of Moore*, 10 A. B. R. (N. S.) 568.)

A remainder interest even though the same may be lost passes to the trustee. (*Dudley, Jr. v. Tucker*, 6 A. B. R. (N. S.) 95.)

Even though the possession or enjoyment may be contingent upon the survival of the taker, the estate is nevertheless vested. (*Estate of Ritsman*, 186 Cal. 567.)

And it is considered alienable and subject to the claims of creditors. (*Newlove v. Mercantile Trust Co.*, 156 Cal. 657.)

Although the person named as the taker of the future estate does not have the right to *claim* the property until the contingent event or situation shall have happened or arisen. (*Estate of Glann*, 177 Cal. 347.)

And unless by the provisions of the trust instrument the beneficiary is restrained, he has a right to assign his interest. (*Title Ins. & Trust Co. v. Duffill*, 191 Cal. 629.)

Noonan v. State Bank of Livermore, 20 A. B. R. (N. S.) 642 (State of Iowa):

“If it is held that the interest . . . was a contingent remainder, then under federal statute, the question arises: Could the plaintiff ‘by any means have transferred’ his interest in this property? We have settled this question in the case of *McDonald v. Bayard Savings Bank*, 123 Iowa 413, 98 N. W. 1025, where we held, in fact, that the contingent interest of a remainderman is such a present and existing one as to be susceptible of conveyance by deed . . . This seems to be the general rule as to rights under contingent remainders.”

Sinclair v. Crabtree, 211 Cal. 524: Under 693 Civil Code, future interest is property either vested or contingent, and under 699 Civil Code:

“Future interests pass by succession, will, and transfer, in the same manner as present interests.”

The following are additional cases in which the courts have determined that the interests passed to the trustee in bankruptcy:

In re Wood, 3 A. B. R. 572; 98 F. 972;

In re Peter J. Shenberger, 4 A. B. R. 487; 102 F. 978;

In re Nelson A. St. John, 5 A. B. R. 190; 105 F. 234;

In re Twaddell, 6 A. B. R. 539; 110 F. 145;

In re McHarry, 7 A. B. R. 83; 111 F. 498;

Woods v. Little, 13 A. B. R. 742; 134 F. 229.

Matter of First Nat. Bank & Trust Co., 34 A. B. R. (N. S.) 806:

“On or about September 29, 1920, Ella M. Brand (hereinafter called the settlor) executed a deed of trust to the Merchants National Bank of Elmira, N. Y. It by merger became the First National Bank and Trust Company of Elmira. By the deed the settlor transferred to the trustee certain personal property and unimproved real property in trust to pay the income to her for life and upon her death, to distribute the principal to named beneficiaries, including her daughter, Mrs. Keeton.”

“About January 19, 1933, said Henrietta S. Keeton was, on her voluntary petition, adjudged a bankrupt. James J. O'Connor was duly appointed trustee

in bankruptcy. He demanded the share of Henrietta S. Keeton from the trustee herein. Both Mrs. Keeton and Mr. O'Connor, her trustee in bankruptcy, are parties to this proceeding. Her interest in the trust estate was, in good faith, omitted from the schedules in bankruptcy. Upon her examination she disclosed it. She has not in any way assigned or parted therewith.

"The question for determination is whether Mrs. Keeton's distributive share in remainder passed to her trustee in bankruptcy."

"When Mrs. Keeton was adjudicated bankrupt, the settlor of this trust was living and the trust was in force. Was her beneficial interest in remainder then 'property' which she 'could by any means have transferred?' This question must be determined under the law of the state of New York."

"Section 15 of the Personal Property Law reads:

"The right of the beneficiary to enforce the performance of a trust to receive the *income* of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise. *But the right and interest of the beneficiary of any other trust in personal property may be transferred.*"

"Section 59 of the Real Property Law reads: [131]

"An expectant estate is descendible and alienable, in the same manner as an estate in possession."

"We think Mrs. Keeton's interest was 'property' and though not vested in possession was vested. Whether vested or contingent, it was transferable and alienable."

"We are cited to Matter of Hoadley (D. C., N.Y.), 3 Am. B. R. 780, 101 F. 233. Of this case 3 Rem-

ington on Bankruptcy, Sec. 32, says: 'In this case the distinction was drawn between contingency of person and contingency of event.' In the present case the only contingency is as to the event. Even a contingency as to the person does not seem to make a trust interest non-transferable under the later cases above cited."

" . . . a possibility, a hope of an heir of a person still living, or of a beneficiary under an insurance policy which is subject to change of beneficiary, does not pass to the trustee in bankruptcy. Such interests are not property. As well said in *National Park v. Billings*, *supra*, 144 App. Div. 536, 540: 'That which the heir has from the courtesy of his ancestor, and which is nothing more than the mere hope of succession' is not the subject of disposition. 'Mere expectancies and bare possibilities of acquiring property do not pass. They do not constitute property nor title to property.' (3 *Remington Bankruptcy*, Sec. 1199.) In *Matter of Baker* (C. C. A., 6th Circ.), 8 Am. B. R. (N. S.) 448, 13 F. (2d) 707, Baker purchased of two brothers their respective expectancies in their mother's estate. *He became bankrupt during his mother's lifetime*. The court held that neither Baker's individual interest nor the interest acquired from his brothers passed to the trustee in bankruptcy."

Where property was left to six sons, no portion to be sold for ten years, the son's share to be forfeited if he contracted bad habits and likewise to be forfeited should the son die before division of property, each son acquired a vested interest subject to divesture upon the happening of the subsequent act and the court determined there was

a vested interest which could be transferred by the devisee. (*Newlove v. Mercantile Trust Company of San Francisco*, 156 Cal. 657.)

Attention is now directed to the "spendthrift" and "non-assignable" provisions of the trust as hereinabove set forth.

California recognizes "spendthrift" trusts. (*Kelly v. Kelly*, 11 Cal. (2d) 356):

"It is of the essence of a spendthrift trust that it is not subject to voluntary alienation by the *cestui*, nor subject to involuntary alienation through attachment or other process at the suit of his creditors. (*McColgan v. Walter McGee, Inc.*, 172 Cal. 182 (155 Pac. 995, Ann. Cas. 1917D, 1050); *Seymour v. McAvoy*, 121 Cal. 438 (53 Pac. 946, 41 L. R. A. 544); *San Diego Trust etc. Bank v. Heustis*, 121 Cal. App. 675 (10 Pac. (2d) 158); *Canfield v. Security First Nat. Bank*, 8 Cal. App. (2d) 277 (48 Pac. (2d) 133); 1 *Bogert, Trusts and Trustees*, p. 75; 43 *Harvard Law Review*, 84; 21 *Cal. Law Rev.* 142; 22 *Cal. Law Rev.* 482.)"

Inasmuch as a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had right to look for payment, they cannot complain that the donor has provided that the income be paid personally to the beneficiary or be not subject to the claims of creditors. (4 *Cal. Law Review*, 426; *McColgan v. Magee, Inc.*, 172 Cal. 182.)

Civil Code 859 may be considered an exception to this doctrine, and where the trust is created to receive the rents and profits of real or personal property, the sum, beyond a fund necessary for the education and support of the

person for whose benefit the trust is created, is liable to the claims of creditors of such persons. (*Canfield v. Security First National Bank*, 8 Cal. App. (2d) 277, and 13 Cal. (2d) page 1.)

Likewise, restraint may be made upon assignment of interest. (*Title Ins. & Trust Co. v. Duffill*, 191 Cal. 629; *Curtin v. Kowalsky*, 145 Cal. 431.)

Unless restrained by the provisions of the trust instrument, the beneficiary has a perfect right to assign his interest. ("Trust," 25 Cal. Jur. 173.)

Where a trust is created for the benefit of another the beneficiary may be restrained by appropriate provisions of the trust instrument from disposing of his trust interest or ownership. (25 Cal. Jur. 174.)

It is insisted by counsel for the trustee that even though the instrument is by its terms nonassignable and is accompanied by provisions deemed appropriate to create a "spendthrift trust," that since in certain instances the bankrupt could make a transfer of the property for a consideration which would be enforced in equity, therefore the "property" was such as the bankrupt (Section 70a (5)) "could by any means have transferred."

This test has been disapproved by the Supreme Court of the United States and it determined that Section 70a (5) which vests the trustee with all the property that the bankrupt "could by any means have transferred" has no application to spendthrift trusts valid and effective against creditors, notwithstanding the beneficiary, under state law as construed by the highest court of the state, may anticipate and assign for his own benefit, to the exclusion of creditors, said power having been determined in effect in a legal exemption in favor of the beneficiary attaching to

and inherent in the property. (*Eaton v. Boston Safe Deposit & Trust Company*, 36 A. B. R. 701; 240 U. S. 427.)

Edith Huff, the Trustor, died more than six months after the filing of the bankruptcy petition herein, therefore the new Section 70a (7) and (8) can have no application here.

“70a. The trustee . . . shall be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy . . . to all . . . (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were non-assignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) . . . All property which vests in the bankrupt within six months after bankruptcy by bequest, devise, or inheritance shall vest in the trustee . . .”

It will be recalled that Section 70a (5) gives the trustee title to property which the bankrupt “could by any means have transferred or which might have been levied upon and sold,” etc.

In some states by application of the state law certain of the interests did not meet the qualifications of subdivision (5) and were determined by the courts not to constitute assets. The said subdivisions (7) and (8) were added which brought the interests into the estate as assets if the condition arose or the death occurred within six months of the filing of the petition.

The trustee points out that the bankrupt should have scheduled the interest. The trustee is, of course, right in connection with this point.

Section 7 (8) of the Bankruptcy Act provides that the bankrupt "shall . . . prepare, make oath to, and file in court . . . a schedule of his property."

Section 30 of the Bankruptcy Act provides that "all necessary rules, forms, and orders as to procedure and for carrying the provisions of this title into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States." Under this section the Supreme Court has prescribed the form of the schedules, and the schedules established by the Supreme Court set forth on Schedule B-4: "Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge."

Eight of the Supreme Court Judges who were sitting at the time the General Orders and Forms were promulgated were on the bench and had previously decided the case of *Pearsall v. Great Northern Railway Co.*, 161 U. S. 646. This decision went to great length in defining vested rights, expectancies, contingent interests, etc., so it can be said that we have rather definite information as to what the Supreme Court intended by Schedule B-4.

I can personally say that after attempting to review many reported cases on the vesting or nonvesting in the trustee of expectancies, vested and contingent remainders, reversions, conditional limitations, rights of entry for conditions broken, executory devises, etc., that it would be an imprudent and hazardous procedure to allow the bankrupt in each instance to make his own determination

as to whether or not the particular interest vested. He is required to list in detail his property which he claims is exempt so that the Court may pass upon the exemption. Likewise he is required to list and schedule those interests, whether they vest in the trustee or not, which are enumerated in Schedule B-4. The scheduling of the same allows the creditors, the trustee and the Court to investigate the particular kind and character of interest and reach a determination as to whether or not the same passes into the Bankruptcy Court. Most certainly the determination should not be left with the bankrupt.

In many cases such as in the instant case there is no record available pertaining to the interest unless the same is supplied by the bankrupt.

Apparently information of the alleged interest came to the creditors after the discharge was granted.

At the first examination of the bankrupt the bankrupt did not reveal the existence of the interest. On the other hand, it must be admitted that he was not asked the direct question as to whether or not he had any such interest.

Counsel for the trustee maintains that the discharge of the bankrupt should be revoked because of the said concealment. He has cited a number of cases, with which I do not disagree, showing the general power of the Court to revoke discharges in instances other than upon grounds set forth in Section 15.

In this case, however, as soon as the bankrupt and his counsel were confronted by the trustee with the information which he had secured in connection with the interest in said trust, they readily admitted the said interest. Counsel for the bankrupt states that at and prior to

the bankruptcy proceedings the bankrupt had presented to him the question of whether or not the said interest was an asset; that he had spent many hours investigating the law on the subject, and that he had rendered an opinion to the bankrupt that the same did not pass to the trustee and was not an asset of the estate and need not be scheduled. At the hearing there was introduced in evidence a brief which had been prepared by the attorney for the bankrupt at the time he originally gave the said advice to the bankrupt when he was preparing the schedules of the bankrupt. I must frankly admit that I agree with his conclusion that the interest is not an asset herein, but I do not agree with his conclusion that the same need not be scheduled. On the other hand, I cannot find that there was any bad faith or concealment. Neither can I find that the bankrupt knowingly or intentionally made a false oath.

Matter of Soroko, 53 A. B. R. (N. S.) 223:

“Accordingly, it may be assumed that the advice given to the bankrupt by his attorney was erroneous and that the bankrupt has not established that his statements under oath on the two occasions were true. The statute, however, bars a discharge only if a false oath was made ‘knowingly and fraudulently,’ that is, if the false statement constituted an ‘intentional untruth.’ In re Slocum (C. C. A. 2nd Cir.), 11 Am. B. R. (N. S.) 16, 22 F. (2d) 282, 285.”

In re Wyche, 51 Fed. Supp. 825:

“To justify a denial of bankrupt’s discharge, failure to list assets must have been made or done with a willful and fraudulent intent. Bankr. Act. Sec. 14, Sub. c(1), 11 U. S. C. A. Sec. 32, Sub. c(1).”

“ . . . the jurisprudence is well established that the act of the bankrupt complained of must have been made or done with a wilful and fraudulent intent to justify denial of bankrupt's discharge. Collier, 14th Ed., Vol. 1, p. 1360, provides: 'In order to justify a refusal of discharge under Sec. 14c (4), it must be shown that the acts complained of were done with an intent to hinder, delay, or defraud his creditors. This intent, moreover, must be an actual fraudulent intent as distinguished from constructive intent.' ”

Therefore, both petitions of the trustee are denied.

[Dated]: December 6, 1943.

HUBERT F. LAUGHARN,

HUBERT F. LAUGHARN,

Referee in Bankruptcy.”

In addition to the authorities cited in the Referee's order we have found additional authorities since the making of the order. These authorities relate to the question of the failure of the bankrupt to list his interest in property. The authorities are in 52 Fed. Supp. 492 and 52 Fed. Supp. 496, and hold that the omission of assets in schedules of bankruptcy, which is an innocent act, is not a bar to discharge. They are as follows:

“A bankrupt, knowingly and fraudulently failing to list his interest in group insurance plan of federal retirement system in his schedules and statement of affairs, is not entitled to discharge, though his estate is not entitled to his funds in such system, but his failure to list such interest because of mistake, oversight or ignorance does not bar discharge. Bankr. Act Sec. 1 *et seq.*; 11 U. S. C. A. Sec. 1 *et seq.*; Civil

Service Retirement Act, Sec. 14, as amended; 5 U. S. C. A. Sec. 729.”

In re Barry, No. 43814, District Court, E. D. New York. Oct. 2, 1943. 52 Fed. Supp. 492.

“A bankruptcy referee erred in sustaining objection to bankrupt’s discharge because of her omission of indebtedness to New York City Teachers Retirement System and interest in pension fund thereof from schedules of her debts and property and statement of her affairs, in absence of finding that such information was knowingly and fraudulently omitted. Bankr. Act Sec. 1 *et seq.*, 11 U. S. C. A. Sec. 1 *et seq.*

“(6) The referee has not found that the information sought, which as in this case was of no great consequence, was knowingly and fraudulently omitted by the bankrupt from her schedules and statement of affairs.

“The conclusion seems inescapable that the failure to furnish the information now complained of was not done knowingly, fraudulently, intentionally or maliciously. It was due solely to the bankrupt’s ignorance, oversight or mistake.

“(7) The omission of assets in schedules of bankruptcy and in statement of affairs which is an innocent act, such as a mistake, oversight or ignorance, is not a bar to discharge. See *In re Taub*, 2 Cir., 98 F. 2d 81; *Willoughby v. Jamison*, 8 Cir., 103 F. 2d 821; *Sharcoff v. Schieffelin & Co.*, 2 Cir., 70 F. 2d 725; *In re Lovich*, 2 Cir., 117 F. 2d 612, 133 A. L. R. 673.”

In re Barry, No. 43815, District Court, E. D. New York. Oct. 2, 1943. 52 Fed. Supp. 496.

At page 14 of his brief, appellant suggests a reference to C. J. S., Vol. 8, p. 1413 for the authority "that the omission was made on advice of counsel does not of itself excuse it." A full reading of the section from which such quotation was taken is directly in point and fully supports respondent's position.

8 C. J. S. 1412, Section 519 a(2):

"OMISSION OF PROPERTY FROM SCHEDULE.

A failure by the bankrupt to schedule all his property *with intent to defraud* his creditors is a ground for denial of a discharge.

Since a bankrupt is required to show the utmost good faith and to make the fullest disclosure of his assets, where he knowingly and *designedly* omits assets from his schedule he will be held to have done so with intent to defraud and will be denied a discharge, unless his conduct is satisfactorily explained, even though the amount omitted is small. On the other hand, a mere omission from, or inaccuracies in a bankrupt's schedule not made knowingly and fraudulently, are not ground for refusing him a discharge. *Thus an innocent omission resulting from inadvertence or mistake, such as an honest belief by the bankrupt that he did not own particular property, is not such concealment as will justify denial of a discharge.* (Citing *In Re: Servel*, 30 F. 2nd 102.) Nevertheless a belief by the bankrupt that property which he owned and possessed was exempt property and therefore need not be scheduled is no excuse for his failure to schedule such property *if it was in fact not exempt*. That the omission was made on advice of counsel does not of itself excuse it. It will be excused for such reasons only if it also appears that the bankrupt stated the facts fully to his counsel and

that the advice of the latter was given and acted upon in good faith with regard to a matter of law only. He is not justified in relying on the advice of his attorney with reference to plain, palpable and transparent facts."

8 C. J. S. 1412, Section 519(3):

"NATURE OF PROPERTY OR BANKRUPT'S INTEREST THEREIN.

The bankrupt must have an existing and valuable interest in property before denial of a discharge can be predicated on a concealment thereof.

A discharge may be refused a bankrupt where he has knowingly or fraudulently concealed an existing and valuable interest in property. It must appear, however, that the bankrupt has an existing interest in the property in order that the refusal of a discharge may be predicated on a concealment thereof, *and by property herein is meant something that is or ought to be an asset of the bankrupt's estate.* Hence, a concealment which will bar a discharge cannot be predicated on a failure to schedule property which would not pass to the trustee, such as exempt property, or property which is pledged for its full value or which has no possible value; and *if the property involved was, in fact, not property of the bankrupt, a denial of a discharge cannot be predicated on a concealment thereof,* even though there is present an intent to conceal because of a mistaken idea of the bankrupt that it was property he did own. * * * *Property acquired after the adjudication does not vest in the trustee, and hence an opposition to a discharge cannot be based on an alleged concealment of such property."* A failure to schedule the income of a trust fund which is liable to creditors

under the Real Property Law of the State and a refusal to turn over the right to the trustees are not grounds for the denying of a discharge, in view of the fact that, the trustee's right to such income is *doubtful*. (In Re: Buchanan, 215 F. 492.)

That a bankrupt's interest in land is doubtful and that, if it exists, it is or may be, exempt as a homestead are facts entitled to consideration on the question of his fraudulent intent to schedule such interest. (In Re: Todd, 112 F. 315.)

Where doubtful question of law is involved it could not be said that bankrupt had 'knowingly and fraudulently' concealed property from his trustee. (In Re: Wetmore, 99 F. 703.)

The mental operation of thinking property is owned, and desiring to conceal it, when in fact no such property exists, does not fall within any of the prohibitions of that section, which, when speaking of concealed or transferred property, always means something that is or ought to be, (in common parlance) assets of the estate. (In Re: Hughes, 262 F. 500.)"

Appellant suggests that a mere reading of the section on bankruptcy in Corpus Juris Secundum and other authorities dealing with the fraudulent concealment of assets or the criminal liability for such concealment would have dictated a different course to bankrupt and to his attorney, Martin Goldman. It is obvious and is support for the testimony of both bankrupt and his said attorney that no thought of concealment occurred to either of them, that no reference or examination of those sections was made.

The case of *In re MacFarlane*, 45 Fed. (2d) 994, is in point, not for the proposition claimed by appellant, but on the point contended for by respondent, to-wit:

That the report of the Referee, when approved by the trial judge, is conclusive upon an appellate court unless it appears that there was an obvious error in the consideration of the facts, or a misapplication of some rule of law. The Court, in that case, makes the very interesting observation that, "if the Trustee in Bankruptcy has a valid claim against the trust estate, he may proceed to recover it in a suit against the proper parties in a court of competent jurisdiction. If he has no such claim, there is no merit to his objections to the discharge." That is exactly the situation presented here.

The ruling in support of the finding of the Referee, and the trial judge granting the discharge was, therefore, made *notwithstanding* that, "in reaching this conclusion, we have assumed that it was the duty of the bankrupt to schedule present interest in the trust itself, whether it was subject to administration in the Bankruptcy Court or not."

The case of *Farmers Savings Bank, et al v. Anton*, 1 Fed (2d) 103, cited by appellant, involved actual fraud and actual deliberate concealment of property *belonging* to the bankrupt's estate for the purpose of defrauding creditors. The fraud was found as a fact by the special master. Throughout the case, the Court refers to the concealed property as "*every known asset legally available to creditors*"; "that he should surrender for the benefit of his creditors"; "which should be applied to their (his debts) payment"; "a part of his assets"; "any of his property." The case is not in point for the reason that

the property there was such property as would pass to the Trustee in Bankruptcy, whereas, in the present case, no interest in the property would or could pass to the Trustee in Bankruptcy.

The *Schute* case, 38 Fed. (2d) 769, cited by appellant, is again, one involving property which was in fact an asset which passed to the Trustee in Bankruptcy. The Court referred to property "belonging to the estate."

The case of *Sinclair v. Butt*, 284 Fed. 568, is based upon the omission to schedule property which would belong to the bankrupt at the time of the filing of the schedules, and it was admitted in argument that the oath of the bankrupt was knowingly false.

In re Perel, 51 Fed. (2d) 506, is cited by appellant for the proposition that, advice of counsel on a plain, palpable and transparent fact, that property which he owns without dispute or question does not have to be scheduled, is not a defense. Surely, counsel for appellant does not mean to contend that there could be no question or dispute of the ownership, of the property herein involved, by respondent at the time of filing of his schedules, or that such ownership was a plain, palpable and transparent fact. On the contrary, the plain, palpable and transparent fact was and is that respondent had no right of ownership whatever in the trust.

Appellant does not cite the more pertinent language of the case, to-wit:

"It is true enough that advice of counsel that certain property does not in fact belong to the bankrupt and need not, therefore, be scheduled with his property, when given upon a full and fair statement of fact is a defense to a charge of fraudulent concealment."

And again that

“where the question of discharge *vel non* turns upon whether testimony has been fraudulently given or concealment or failure to disclose have been willful and fraudulent, the question of the intent with which the statements were made or the acts done is of the essence of the inquiry. In such case, the demeanor of the bankrupt in the course of the examination, the manner in which he testifies, as much as the things he says, are the important criteria. In such case, the Referee, as special master, hearing the bankrupt’s testimony in the various examinations, is in a better position to determine the question of falsity than is the District Judge from the printed record.”

In re Brietling, 133 Fed. 146, involves property which the bankrupt “withheld from creditors—which lawfully he should devote to the payment of his debts.”

In *Pollack v. Meyer Bros. Drug Co.*, 233 Fed. 861, the Court found as a fact that the interest of the bankrupt in the trust, which had been omitted from the schedules, was such an interest as did in fact pass to the Trustee in Bankruptcy, that such fund constituted a vested remainder. There was a concealment of property to which the Trustee and his creditors *could legally resort*.

In *Duggins v. Heffron*, 128 Fed. (2d) 546, the Referee in Bankruptcy found as a fact that the bankrupt knowingly and fraudulently and with intent to hinder, delay and defraud creditors, concealed—(certain real property by conveying the same to his wife and concealing the fact that his wife held the same in trust for him). The oath of the bankrupt there was false in that he stated that the property had been conveyed upon a consideration to him,

whereas in fact, it had been conveyed without consideration and was a secret trust.

It appears that every case cited by appellant is one in which the property omitted from the schedules or concealed was such property as was legally available for the payment of bankrupt's debts.

Appellant makes much of the brief prepared by counsel for the bankrupt at the time of the filing of the schedules. An examination of the brief will indicate that the only question briefed was whether the interest of the bankrupt in the Huff Trust was an asset that would pass to the Trustee in Bankruptcy. It is submitted that to this the authorities cited in the brief support the position of the bankrupt that such property did not pass to the Trustee in Bankruptcy.

Appellant, at page 28 of his brief, argues for the same rights as were given to the plaintiff in *Kelley v. Kelley*. Be it remembered that in *Kelley v. Kelley*, plaintiff was specifically denied any interest in the trust itself or in the property attempted to be assigned by the defendant to plaintiff, his wife, in violation of the spendthrift provisions of such trust. Plaintiff acquired only a money judgment in an amount equal to the value of the assignment, had it been valid, which judgment could be collected from any other funds of the defendant, *but not from the trust itself*. If appellant here were to secure such a right, such a judgment, out of what funds could he collect his judgment? Certainly not out of the trust funds, since that was specifically denied in the *Kelley* case; not out of any funds or property belonging to the bankrupt at the time of his bankruptcy, since all of such property already belonged to appellant by virtue of the fact of bankruptcy. The only other source would necessarily have to be prop-

erty which the bankrupt might acquire after his discharge in bankruptcy. To permit a Trustee in Bankruptcy to acquire a claim against the bankrupt collectible out of property acquired after discharge in bankruptcy would defeat the very purpose of the Bankruptcy Act. To follow appellant's argument to its logical, but absurd, conclusion, we must be prepared to hold that a Trustee in Bankruptcy could in every instance force a bankrupt to make an assignment of future earnings or after acquired property, thereby continuing his debts, listed in his schedules, into the future and, in effect, denying the bankrupt all of the benefits specifically granted to him under the Bankruptcy Act.

We respectfully submit that both the Referee in Bankruptcy and the District Judge were correct in their rulings and orders and should be sustained.

RUPERT B. TURNBULL,
MARTIN GOLDMAN,

Attorneys for Bankrupt.

No. 10805

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRY C. CLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

AUG 2 - 1944

PAUL P. O'BRIEN,
CLERK

No. 10805

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRY C. CLAIR,

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vs.

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Transcript of Record

Upon Appeal from the District Court of the United States
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Appeal:

Bond for Costs on	48, 71
Designation of Contents of Record (Second Appeal)	76
Notice of	48, 71
Statement of Points on which appellant intends to rely on and designation of record to be printed	52, 80
Statement of Points on which appellant intends to rely on	75
Attorneys, names and addresses of	1, 57
Bond for Costs on Appeal	48, 71
Certificate of Clerk	50, 77
Consent of entry of final judgment and Petition for partial distribution of funds	21
Declaration of Taking	10
Designation of Contents of Record (Second Appeal)	76
Final judgment in condemnation	65
Judgment on the declaration of taking and order of possession	17

Index	Page
Judgment on Verdict	44
Motion for Order Vacating Order fixing value and disbursing funds and final judgment in Condemnation	41
Names and Addresses of Attorneys	1, 57
Notice of Appeal	48, 71
Order	79
Order Fixing Value and Disbursing Funds and final judgment in Condemnation	29
Order for Partial Distribution of Funds	27
Order Vacating Order fixing value and disburs- ing funds and final judgment in Condemna- tion	42
Petition for Condemnation	2
Proceedings	36
Reporter's Certificate	39
Showing in opposition to Motion for entry of final judgment in Condemnation	58
Statement of Points on which Appellant intends to rely on Appeal and designation of record to be printed	52
Statement of Points on which Appellant intends to rely on Appeal (Second Appeal)	75
Stipulation	73

Index

Page

Supplemental Transcript of Record	55
---	----

Exhibits:

“A”—Statement by Norman M. Littell, Assistant Attorney General in Charge of the Lands Division, regarding the Camp Adair Cases, Camp Adair, Oregon	60
--	----

No. 1.—Extract from Sunday Oregonian, March 19, 1944 regarding three sep- arate investigative efforts	62
---	----

No. 2.—Extract from Oregon Journal Sunday, March 19, 1944 under head- ing “Adair Timber Deals on Level”	63
---	----

Witness for the U.S.A.:

Wallace, W. B.

—direct	37
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525 Corbett Building, Portland, Oregon,
Attorneys for Appellee.

In the District Court of the United States
For the District of Oregon

Civil No. 1677

UNITED STATES OF AMERICA,

Petitioner,

vs.

HARRY C. CLAIR, an unmarried man; CALIFORNIA PACIFIC TITLE INSURANCE COMPANY, a corporation; M. F. CAMPBELL; E. C. BUTMAN and JANE DOE BUTMAN, his wife, if married; C. A. HUGHES and JANE DOE HUGHES, his wife, if married; B. H. OLDFIELD and JANE DOE OLDFIELD, his wife, if married; VICTORIA RICHARDS and JOHN DOE RICHARDS, her husband, if married; L. E. OSGOOD and JANE DOE OSGOOD, his wife, if married; ROBERT W. WALLACE and JANE DOE WALLACE, his wife, if married; JOHN WIENERT and JANE DOE WIENERT, his wife, if married; W. R. COOTE and JANE DOE COOTE, his wife, if married; and BENTON COUNTY, a municipal corporation and political subdivision of the State of Oregon,
Defendants.

PETITION FOR CONDEMNATION

Leave of Court having been obtained, your petitioner United States of America, through its attorneys, files this Petition for Condemnation and

respectfully represents to this Honorable Court as follows:

I.

That the defendant Benton County is a municipal corporation and political subdivision of the State of Oregon and is by law vested with the power to sue and be sued in its own name;

II.

That this proceeding is instituted pursuant to and under authority of the following Acts of Congress:

The Act of August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257);

The Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C. Secs. 258a) and Acts supplementary thereto and amendatory thereto;

The Act of August 18, 1890 (26 Stat. 316) as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U.S.C. Sec. 171) and March 27, 1942 (Public Law 507—77th Congress);

The Act of April 28, 1942 (Public Law 528—77th Congress);

III.

That pursuant to and under authority of the Acts of Congress above [1*] cited and referred to, the Secretary of War of the United States of America (1) has selected the hereinafter described lands for acquisition by the United States of America for use in connection with the establishment of a military training camp known as Camp Adair, Oregon,

*Page numbering appearing at foot of page of original certified Transcript of Record.

and for such other uses as may be authorized by Congress or by Executive Order; (2) has determined and is of the opinion that it is necessary and advantageous to the interest of the United States to acquire by condemnation under judicial process the estate or interest hereinafter set forth in and to the lands so selected and hereinafter described for the public use and purpose of adequately providing for the establishment of a military training camp and for related military purposes, and that said lands are required for immediate use; and (3) has made application to the Attorney General of the United States to cause this proceeding to be commenced, in pursuance of which application the Attorney General of the United States has authorized this proceeding to be instituted;

IV.

That the estate taken by the petitioner in this proceeding is the full fee simple title in and to the hereinafter described lands, subject, however, to existing easements for public roads and highways, for public utilities, for railroads, for pipe lines and for water and sewage systems;

V.

That the lands condemned by and through this proceeding are located in Benton County, Oregon, within this judicial district, and are more particularly described as follows:

Tract No. B-67

Tract 1: Beginning at Section corner to

Sections 14, 15, 22 and 23, Township 10 South, Range 5 West of the Willamette Meridian, and running thence N. $0^{\circ} 2'$ W. 33.216 chains to the center of the County Road; thence S. $49^{\circ} 54'$ East 6.814 chains to the intersection of the center of the county road with the West line of Francis Writsman D.L.C. #50, thence S. $5^{\circ} 36'$ East 28.92 chains to the South line of Section 14 which is .70 chains N. $5^{\circ} 36'$ W. of the Southwest corner of said claim; thence S. $89^{\circ} 40'$ West 8.021 chains to the place of beginning, in Benton County, Oregon.

Tract 2: Also the South half of Section 15, Township 10 South, Range 5 West of the Willamette Meridian, excepting the following:

Beginning at a $\frac{3}{4}$ " pipe, the quarter section corner between Sections 14 and 15, said township and range, and running thence S. $0^{\circ} 2'$ East 6.523 chains to the center of the County Road; thence [2] N. $49^{\circ} 54'$ W. 10.137 chains along the center of the County Road; thence S. $89^{\circ} 57'$ East 7.75 chains to the place of beginning, in Benton County, Oregon.

Tract 3: Also, the Northwest Quarter of Section 22, also the West half of the Northeast Quarter of said Section 22, also the North half of the Southwest Quarter of said Section 22, also the Northwest Quarter of the Southeast Quarter of said section 22, all lying and being situated in Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

Tract 4: All of the Southeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5' West of the Willamette Meridian, in Benton County, Oregon.

Tract 5: Also the Northeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

The above described lands aggregate 777.7 acres, more or less; and that a plan showing the above described lands is marked Schedule "B" attached to the Declaration of Taking on file herein;

VI.

That the public use for which the hereinabove described lands are taken is adequately to provide for the establishment of a military training camp or other war purposes;

VII.

That funds for the acquisition of the hereinabove described lands have been appropriated by the aforesaid Act of Congress approved April 28, 1942 (Public Law 528—77th Congress), and that the Secretary of War of the United States has declared that he is of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor;

VIII.

That the petitioner has caused diligent search to be made among the public records of the State of

Oregon and of Benton County, wherein the above described lands are located, to determine the names of the owners and the names of every other person interested in the lands taken herein or any part thereof, and that all of said persons insofar as can be ascertained from the public records have been made parties to this proceedings;

IX.

That the petitioner has done and performed every act and thing required by law to be done by said petitioner as a condition precedent to the [3] bringing and maintaining of this action;

X.

That this proceeding was originally a part of the cause entitled *United States vs. O. G. Simpson, et al.*, Civil No. 1111, wherein on the 18th day of June, 1942, this Court entered an order granting possession to the United States of America as of said date of the lands hereinabove described along with other lands included in said proceeding; that simultaneously with the filing of the Petition herein there is also filed a Declaration of Taking in which the Secretary of War of the United States has estimated that the sum of \$20,872.90 is just compensation for the taking of the interest hereinabove set forth in and to the hereinabove described lands and that this amount, to-wit: \$20,872.90 is deposited into the Registry of this Court under the provisions of the Declaration of Taking Act approved February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258a).

Wherefore, your petitioner prays:

(a) That this Court make an order reciting the filing of the Declaration of Taking and Petition herein and the depositing into the Registry of this Court of the estimated just compensation for the taking herein of the above described lands and the effect thereof as to the vesting of title in the United States of America to said lands, subject to the limitations and exceptions hereinabove set forth, and granting immediate possession of said lands under said Declaration of Taking to the petitioner United States of America; and

(b) That this Honorable Court take jurisdiction of this cause and make and have entered herein all such orders, judgments and decrees as may be necessary to determine the ownership of the above described lands, and to fix the value of the same and the amount of compensation to be paid by petitioner to whoever may be adjudged to be the owner or owners of the above described lands, and to make and have entered all such further orders, judgments and decrees as may be necessary to vest title to the estate or interest hereinabove set out in and to the lands hereinabove described in the United States of America and to make just distribution of

the estimated and final award among those entitled thereto as expeditiously as possible.

BERNARD H. RAMSEY,

Special Assistant to The

Attorney General;

JOHN E. WALKER,

STANLEY R. DARLING,

JAMES LEAVY,

BERT C. BOYLAN, [4]

HARRY D. BOIVIN,

Special Attorneys, Depart-

ment of Justice, 525 Corbett

Building, Portland, Oregon.

JOHN E. WALKER

State of Oregon,

County of Multnomah—ss.

I, John E. Walker, being first duly sworn, depose and say: That I am a duly appointed, qualified and acting Special Attorney of the Department of Justice; that I am possessed of information from which I have prepared the foregoing Petition for Condemnation; that the allegations therein contained are true as I verily believe.

JOHN E. WALKER

Subscribed and sworn to before me this 3 day of December, 1942.

[Seal]

RENEE FRITSCH

Notary Public for Oregon

My Commission Expires: 2/5/45

[Endorsed]: Filed December 3, 1942 [5]

In the United States District Court in and For the
District of Oregon

No. 7

UNITED STATES OF AMERICA,

Petitioner,

vs.

HARRY C. CLAIR and JANE DOE CLAIR, his wife, if married; CALIFORNIA PACIFIC TITLE INSURANCE COMPANY, a corporation; M. F. CAMPBELL, E. C. BUTMAN, and JANE DOE BUTMAN, his wife, if married; C. A. HUGHES and JANE DOE HUGHES, his wife, if married; B. H. OLDFIELD and JANE DOE OLDFIELD, his wife, if married; VICTORIA RICHARDS and JOHN DOE RICHARDS, her husband, if married; L. E. OSGOOD and JANE DOE OSGOOD, his wife, if married; COUNTY OF BENTON, a political subdivision; and 777.7 acres of land, more or less, in Benton County, State of Oregon,

Defendants.

DECLARATION OF TAKING

To the Honorable, The United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat.

1421, 40 U. S. C. sec. 258a), and Acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U.S.C. sec. 171) and March 27, 1942 (Public Law 507—77th Congress), which Acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved April 28, 1942 (Public Law 528—77th Congress), which Act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for a military training camp and other purposes incident thereto. The said lands have been selected by me for acquisition by the United States for use in connection with the [6] establishment of Camp Adair, Oregon and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of part of the same lands described in the petition in the case United States of America, petitioner, vs. O. G. Simpson, et al, and 26,968 acres of land, more or less, in Benton, Linn, and Polk Counties, State of Oregon, Civil No. 1111 from which case the lands described in this Declaration of Taking will have been severed prior to the filing hereof.

3. The estate taken for said public uses is the full fee simple title thereto, subject, however, to existing easements, if any, for public roads and highways, for public utilities, for railroads, for pipe lines, and for water and sewage systems.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said lands, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this Declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 19th day of November, A. D. 1942, in the City of Washington, District of Columbia.

HENRY L. STIMSON

Secretary of War of the
United States. [7]

Schedule "A"

The land which is the subject matter of this Declaration of Taking and of this condemnation aggregates 777.7 acres, more or less, situate and

being in the County of Benton, State of Oregon. A description of the lands taken, together with a list of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

Tract No. B-67

Description:

Tract 1. Beginning at Section corner to Sections 14, 15, 22 and 23, Township 10 South, Range 5 West of the Willamette Meridian, and running thence N. $0^{\circ} 2'$ W. 33.216 chains to the center of the County Road; thence S. $49^{\circ} 54'$ East 6.814 chains to the intersection of the center of the county road with the West line of Francis Writsman D.L.C. #50, thence S. $5^{\circ} 36'$ East 28.92 chains to the South line of Section 14 which is .70 chains N. $5^{\circ} 36'$ W. of the Southwest corner of said claim; thence S. $89^{\circ} 40'$ West 8.021 chains to the place of beginning, in Benton County, Oregon.

Tract 2. Also the South half of Section 15, Township 10 South, Range 5 West of the Willamette Meridian, excepting the following: Beginning at a $\frac{3}{4}$ " pipe, the quarter section corner between Sections 14 and 15, said township and range, and running thence S. $0^{\circ} 2'$ East 6.523 chains to the center of the County Road; thence N. $49^{\circ} 54'$ W. 10.137 chains along the center of the County Road; thence S. $89^{\circ} 57'$ East 7.75 chains to the place of beginning, in Benton County, Oregon.

Tract 3. Also, the Northwest Quarter of Section 22, also the West half of the Northeast Quarter

of said Section 22, also the North half of the Southwest Quarter of said Section 22, also the Northwest Quarter of the Southeast Quarter of said Section 22, all lying and being situated in Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

Tract 4. All of the Southeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

Tract 5. Also the Northeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

Name of purported owner: Harry C. Clair.

Address of purported owner: 2157 N. E. 28th Avenue, Portland, Oregon.

Estimated Compensation: \$20,872.90.

The gross sum estimated to be just compensation for the lands hereby taken is \$20,872.90. [8]

5

Endorsed
Filed December 3, 1943

In the District Court of the United States
For the District of Oregon

Civil No. 1677

UNITED STATES OF AMERICA,
Petitioner,
vs.

HARRY C. CLAIR, an unmarried man; CALIFORNIA PACIFIC TITLE INSURANCE COMPANY, a corporation; M. F. CAMPBELL; E. C. BUTMAN and JANE DOE BUTMAN, his wife, if married; C. A. HUGHES and JANE DOE HUGHES, his wife, if married; B. H. OLDFIELD and JANE DOE OLDFIELD, his wife, if married; VICTORIA RICHARDS and JOHN DOE RICHARDS, her husband, if married; L. E. OSGOOD and JANE DOE OSGOOD, his wife, if married; ROBERT W. WALLACE and JANE DOE WALLACE, his wife, if married; JOHN WIENERT and JANE DOE WIENERT, his wife, if married; W. R. COOTE and JANE DOE COOTE, his wife, if married; and BENTON COUNTY, a municipal corporation and political subdivision of the State of Oregon,

Defendants.

JUDGMENT ON THE DECLARATION OF
TAKING AND ORDER OF POSSESSION

This matter coming on upon motion of the petitioner United States of America, by and through its attorneys of record, for a judgment on the

declaration of taking and order of possession, and a hearing having been held in open court on said motion, and the Court having considered said declaration of taking and the petition for condemnation heretofore filed herein, Finds: First: That the United States of America is empowered by law to acquire property by condemnation under judicial process for the use and purposes set forth in said declaration of taking and petition for condemnation; Second: That this proceeding was instituted and the petition for condemnation and declaration of taking herein were filed at the request of the Secretary of War of the United States, the authority empowered by law to acquire the lands described in said petition and declaration of taking and at the direction of the Attorney General of the United States, the person authorized by law to direct the institution of such proceedings; Third: That said declaration of taking was filed on December 3, 1942, and simultaneously therewith the sum of \$20,872.90 was deposited in the Registry of this Court in this cause as the estimated just compensation as set forth in said declaration of taking, and that said declaration of taking contained (1) a statement of authority under which and the public use for which the lands described therein were taken; (2) a description of the lands taken [10] sufficient for the identification thereof; (3) a statement of the estate or interest taken in said lands for said public use; (4) a plan showing the lands taken; (5) a statement of the sum of money estimated by the Secretary of War of the United States to be

just compensation for the taking of the lands described therein; and (6) a statement by the said Secretary of War that in his opinion the ultimate award for the taking of said lands will probably be within any limits prescribed by law as the price to be paid therefor; Fourth: That possession of the lands described in said declaration of taking and petition for condemnation on file herein was granted to the United States of America as of June 18, 1942, by order of this Court made and entered on that date in the case of *United States of America v O. G. Simpson, et al.*, Civil No. 1111. Now, Therefore, it is hereby Ordered, Adjudged and Decreed: (1) That the full fee simple title in and to the lands described in the petition for condemnation, and in the declaration of taking on file herein, and which is described as follows:

Tract No. B-67

Tract 1: Beginning at Section corner to Sections 14, 15, 22 and 23, Township 10 South, Range 5 West of the Willamette Meridian, and running thence N. $0^{\circ} 2'$ W. 33.216 chains to the center of the County Road; thence S. $49^{\circ} 54'$ East 6.814 chains to the intersection of the center of the county road with the West Line of Francis Writsman D.L.C. #50, thence S. $5^{\circ} 36'$ East 28.92 chains to the South line of Section 14 which is .70 chains N. $5^{\circ} 36'$ W. of the Southwest corner of said claim; thence S. $89^{\circ} 40'$ West 8.021 chains to the place of beginning, in Benton County, Oregon.

Tract 2: Also the South half of Section 15, Township 10, South, Range 5 West of the Willamette Meridian, excepting the following: Beginning at a 3/4" pipe, the quarter section corner between Sections 14 and 15, said township and range, and running thence S. 0° 2' East 6.523 chains to the center of the County Road; thence N. 49° 54' W. 10.137 chains along the center of the County Road; thence S. 89° 57' East 7.75 chains to the place of beginning, in Benton County, Oregon.

Tract 3: Also, the Northwest Quarter of Section 22, also the West half of the Northeast Quarter of said Section 22, also the North half of the Southwest Quarter of said Section 22, also the Northwest Quarter of the Southeast Quarter of said Section 22, all lying and being situated in Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

Tract 4: All of the Southeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

Tract 5: Also the Northeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette [11] Meridian in Benton County, Oregon.

The above described lands aggregate 777.7 acres, more or less; became and was vested in the petitioner United States of America as of December 3, 1942, the date of the filing of said declaration of taking herein and the depositing into the Registry

of this Court of the amount of estimated just compensation, free and discharged of all claims and liens of every kind whatsoever, subject, however, to existing easements, if any, for public roads and highways, for public utilities, for railroads, for pipe lines, and for water and sewage systems; (2) That on said date, to-wit: December 3, 1942, the right to receive just compensation for the taking of the interest hereinabove set out in the lands hereinabove described vested in the persons entitled thereto, and that the amount of just compensation to be paid for the taking of said lands shall be ascertained and awarded in this proceeding as established by judgment herein, pursuant to law; and (3) That possession under said declaration of taking of the lands hereinbefore described be delivered forthwith to and taken by petitioner United States of America.

Dated at Portland, Oregon, this 3rd day of December, 1942.

JAMES ALGER FEE

District Judge

[Endorsed]: Filed December 3, 1942. [12]

[Title of District Court and Cause.]

**CONSENT TO ENTRY OF FINAL JUDGMENT
AND PETITION FOR PARTIAL DISTRIBUTION OF FUNDS**

Comes now the defendant Harry C. Clair, an unmarried man, and in this, his consent to entry of

final judgment and petition for partial distribution of funds, respectfully represents to this Court as follows:

I.

That in the above-entitled proceeding the United States of America has taken the full fee simple title, subject to existing easements for public roads and highways, for public utilities, for railroads, for pipe lines, and for water and sewage systems, in and to the following-described lands situate in Benton County, Oregon, to-wit:

Tract No. B-67

Tract 1: Beginning at Section corner to Sections 14, 15, 22 and 23, Township 10 South, Range 5 West of the Willamette Meridian, and running thence N. $0^{\circ} 2'$ W. 33.216 chains to the center of the County Road; thence S. $49^{\circ} 54'$ East 6.814 chains to the intersection of the center of the county road with the West Line of Francis Writsman D.L.C. #50, Thence S. $5^{\circ} 36'$ East 28.92 chains to the South line of Section 14 which is .70 chains N. $5^{\circ} 36'$ W. of the Southwest corner of said claim; thence S. $89^{\circ} 40'$ West 8.021 chains to the place of beginning, in Benton County, Oregon;

Tract 2: Also the South half of Section 15, Township 10 South, Range 5 West of the Willamette Meridian, excepting the following: Beginning at a $3/4''$ pipe, the quarter section corner between Sections 14 and 15, said township and range, and running thence S. $0^{\circ} 2'$ East 6.523 chains to the center of the County Road; thence N. $49^{\circ} 54'$ W. 10.137

chains along the center of the County Road; thence S. 89° 57' East 7.75 chains to the place of beginning, in Benton County, Oregon;

Tract 3: Also, the Northwest quarter of Section 22, also the West half of the Northeast Quarter of said Section 22, also the North half of the Southwest Quarter of said Section 22, also the Northwest Quarter of the Southeast Quarter of said Section 22, all lying and being situated in Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon;

Tract 4: All of the Southeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon; [13]

Tract 5: Also the Northeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon;

The above described lands aggregate 777.7 acres, more or less;

II.

That the defendant Harry C. Clair, an unmarried man, was the true and record owner of the hereinbefore described lands immediately prior to the time that the title to said lands vested in the United States of America, and that the title of said defendant was divested by the filing of the declaration of taking in this cause on December 3, 1942;

III.

That immediately prior to the granting of an or-

der of possession of the lands hereinbefore described to the United States of America by this Court in the cause of United States v. O. G. Simpson, et al., Civil No. 1111, from which this cause was severed, the right of occupancy and possession of said lands was vested solely in the defendant Harry C. Clair and Robert W. Wallace, as tenant of the said Harry C. Clair, and that no person, firm or corporation has been engaged by the petitioning defendant to perform work of any kind upon said lands or furnish materials of any kind to or for said lands for which a lien thereon might have been claimed within the sixty-one days immediately preceding the granting of the aforementioned order of possession on June 18, 1942, or for which a lien might be claimed within the period subsequent to June 18, 1942, and the filing of the declaration of taking on December 3, 1942, herein;

IV.

That no assignment or conveyance of the interest of the petitioning defendant in or to said lands or the right of said defendant to just compensation for the taking thereof has been made, save and except transfer of such title as was effected by the filing of the declaration of taking herein;

V.

That your petitioning defendant has not removed any of the timber that was located upon the lands hereinbefore described subsequent to the cruise of the timber on said lands made in August, 1942, nor has any other person under the direction or author-

ity of said petitioning defendant removed any of the timber upon said lands subsequent to August, 1942; [14]

VI.

That there has been heretofore deposited in the Registry of this Court in this cause for the use and benefit of the persons entitled thereto the sum of \$20,872.90 as estimated just compensation for the taking of the lands hereinbefore described;

VII.

That there are no liens or encumbrances against said lands except taxes due the County of Benton, Oregon, for the current year 1942-43, and that the petitioning defendant is entitled to receive all of said compensation after the payment of said taxes, and the petitioning defendant does hereby agree to accept as full settlement of all claims against the United States of America and as full final and complete award of the reasonable and just compensation for the taking of the hereinbefore described lands the sum of \$20,872.90, and petitioning defendant further represents and alleges that said sum of \$20,872.90 is the full fair market value of the lands so taken; that the petitioning defendant Harry C. Clair does hereby submit himself generally to the jurisdiction of this Court in this cause and does waive the right to the intervention of a jury in the above-entitled proceeding for the purpose of fixing the reasonable and just compensation to be paid to said petitioning defendant for the taking of the hereinabove described lands, and does expressly

agree that just compensation therefor may be fixed by this Court without reference to a jury.

Wherefore, petitioning defendant prays for an order of this Court fixing the full fair market value and the reasonable and just compensation for the taking of the lands aforementioned at the sum of \$20,872.90 as of the date of the filing of the declaration of taking herein, and for an order of this Court directing the Clerk of this Court to pay to the petitioning defendant Harry C. Clair the sum of \$12,000.00 in partial distribution of the aforementioned sum on deposit herein, without charging commission or poundage fee thereon.

HARRY C. CLAIR [15]

State of Oregon,
County of Multnomah—ss.

I, Harry C. Clair, being first duly sworn, on oath depose and say:

That I am one of the defendants in the above-entitled cause; that I have read the foregoing Consent to Entry of Final Judgment and Petition for Partial Distribution of Funds; that I know the contents thereof, and that the same is true as I verily believe.

HARRY C. CLAIR

Subscribed and sworn to before me this 16th day of December, 1942.

(Seal)

BERT C. BOYLAN

Notary Public for Oregon,

My commission expires: May 6, 1945

[Endorsed]: Filed December 23, 1942 [16]

[Title of District Court and Cause.]

ORDER FOR PARTIAL DISTRIBUTION
OF FUNDS

This matter coming on to be heard upon the consent to entry of final judgment and petition for partial distribution of funds of the defendant Harry C. Clair and upon the oral motion of the petitioner United States of America herein for an order of partial distribution, and said defendant Harry C. Clair, by and through his consent to entry of final judgment, having expressly submitted himself to the jurisdiction of this Court, and the petitioner appearing herein through its attorneys of record; And It Appearing to the Court from the allegations contained in the consent of the defendant Harry C. Clair herein and from the records and files herein that the said Harry C. Clair was the owner of the lands sought to be acquired by the United States of America through this proceeding; that at the time of the granting of an order of possession by this Court to the United States of the lands described in the declaration of taking and petition for condemnation in this cause, the right of occupancy and possession of said lands was vested solely in the defendant Harry C. Clair; And It Further Appearing to the Court that the sum of \$20,872.90 is now on deposit in the Registry of this Court in the above-entitled cause as estimated just compensation for the taking of the full fee simple title to the lands described in the petition for condemnation herein, subject to existing easements for public roads and

highways, for public utilities, for railroads, for pipe lines and for water and sewage systems; that the retention of \$8,872.90 of said estimated just compensation will be adequate to meet any claims or liens outstanding against said lands other than the claim of the defendant Harry C. Clair to compensation therefor; and that \$12,000.00 of said estimated compensation may be and should be disbursed to the defendant Harry C. Clair, an unmarried man, Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the [17] Clerk of this Court be and he hereby is directed to forthwith pay over to the said defendant Harry C. Clair, 3560 N.E. Klickitat Street, Portland, Oregon, the sum of \$12,000.00 out of the sum of \$20,872.90 now on deposit in the Registry of this Court in this cause, without charging commission or poundage fees thereon, and that said Clerk take the receipt of said defendant therefor.

Dated at Portland, Oregon, this 23rd day of December, 1942.

CLAUDE McCOLLOCH

District Judge.

[Endorsed]: Filed December 23, 1942. [18]

United States District Court

District of Oregon

Portland, Oregon, December 24, 1942

Received from G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, the sum of Twelve Thousand Dollars, on ac-

count of compensation in cause Civ. 1677, United States vs. Harry C. Clair et al.

HARRY C. CLAIR

[Endorsed]: Filed December 24, 1942. [19]

[Title of District Court and Cause.]

ORDER FIXING VALUE AND DISBURSING
FUNDS AND FINAL JUDGMENT IN
CONDEMNATION

This matter coming on upon the motion of the United States of America, petitioner herein, by and through its attorneys of record, for an order fixing value and disbursing funds and final judgment in condemnation; and the defendant Harry C. Clair, an unmarried man, having appeared herein by and through a consent to entry of final judgment, wherein said defendant prayed for an order of this Court fixing the full fair market value and the reasonable just compensation for the taking of the lands herein condemned in the sum of \$20,872.90; and a disclaimer of interest and consent to entry of judgment heretofore been filed in this cause by the California Pacific Title Insurance Company, a corporation, wherein said defendant waived any claim to any part of the compensation for the taking of said lands; and an order of default having heretofore been entered in this cause as to the defendants M. F. Campbell, Victoria Richards and John Doe Richards, her husband, if married, L. E. Osgood and Jane Doe Osgood, his wife, if married,

W. R. Coote and Jane Doe Coote, whose true name is Theresa M. Coote, husband and wife; and an order of dismissal having been heretofore entered in this cause as to the defendants E. C. [20] Butman and Jane Doe Butman, his wife, if married, C. A. Hughes and Jane Doe Hughes, his wife, if married, B. H. Oldfield and Jane Doe Oldfield, his wife, if married; and a disclaimer of interest and consent to entry of judgment having been heretofore filed in this cause by the defendants Robert W. Wallace and Jane Doe Wallace, whose true name is Amy F. Wallace, husband and wife, wherein said defendants waived any claim to any part of the compensation to be paid for the taking of the lands herein condemned; and a disclaimer of interest and consent to entry of judgment having been heretofore filed in this cause by John Wienert and Jane Doe Wienert, whose true name is Edna E. Wienert, husband and wife, and the defendant Benton County, a municipal corporation and political subdivision of the State of Oregon, having heretofore filed answer in this cause, wherein it is alleged that there are no taxes due said defendant on the real property described in the Petition for Condemnation on file herein; and the Court having heard testimony as to what constitutes reasonable and just compensation to be paid for the taking of the lands described in the Petition for Condemnation and Declaration of Taking on file herein, and hereinafter described, and having considered the evidence presented as to the rights of the various defendants to the reasonable and just compensation therefor, and being

fully advised as to the law and facts herein, Finds: First: That pursuant to the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257; the Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and Acts supplementary thereto and amendatory thereof; the Act of August 18, 1890 (26 Stat. 316) as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U.S.C. Sec. 171) and March 27, 1942 (Public Law 507 - 77th Congress); the Secretary of War was and is authorized to acquire real estate by condemnation under judicial process in the name of the United States of America; Second: That pursuant to said authority the Secretary of War has selected the hereinafter described lands for acquisition by the United States of America for use in connection with the establishment of a military training camp known as Camp Adair, Oregon, and for related military purposes, and for such other uses as may be authorized by Congress or by Executive Order, and has determined and is of the opinion that the herein- [21] after described lands are necessary adequately to provide for the establishment of a military training camp and for related military purposes, and that said lands are required for immediate use, and that it is necessary and advantageous to the interest of the United States to acquire the hereinafter described lands by condemnation under judicial process, and that by direction of the Attorney General of the United States, pursuant to the request of the Secretary of War, this condemnation proceeding was instituted

pursuant to the aforementioned statutes for the purpose of acquiring the estate or interest hereinafter set forth in and to the lands so selected; Third: That funds for the acquisition of said lands were appropriated by the Act of Congress approved April 28, 1942 (Public Law 528 - 77th Congress), and that there was deposited in the Registry of this Court in this cause the sum of \$20,872.90 as estimated just compensation for the taking of the hereinafter described lands under the the Declaration of Taking filed in this cause on December 3, 1942; Fourth: That pursuant to the filing of the Declaration of Taking aforesaid and the deposit of \$20,872.90 as estimated just compensation in the Registry of this Court and the filing of a Petition for Condemnation, the full fee simple title in and to the lands hereinafter described, subject however to existing easements for public roads and highways, for public utilities, for railroads, for pipe lines and for water and sewage systems, vested in the United States of America, free and discharged of all claims of any kind whatsoever; Fifth: That at the time of the filing of the Declaration of Taking aforesaid the fee simple title to the lands hereinafter described was vested in the defendant Harry C. Clair, an unmarried man, free and clear of all liens and encumbrances; that the defendants California Pacific Title Insurance Company, a corporation, M. F. Campbell, E. C. Butman and Jane Doe Butman, his wife, if married, C. A. Hughes and Jane Doe Hughes, his wife, if married, B. H. Oldfield and

Jane Doe Oldfield, his wife, if married, Victoria Richards and John Doe Richards, her husband, if married, L. E. Osgood and Jane Doe Osgood, his wife, if married, Robert W. Wallace and Jane Doe Wallace, whose true name is Amy F. [22] Wallace, husband and wife, John Wienert and Jane Doe Wienert, whose true name is Edna E. Wienert, husband and wife, W. R. Coote and Jane Doe Coote, whose true name is Theresa M. Coote, husband and wife, and Benton County, a municipal corporation and political subdivision of the State of Oregon, have no right, title or interest in and to the lands herein condemned or the funds on deposit in this cause; Sixth: That at the time of the filing in this Court of the Declaration of Taking aforesaid, the full market value of the lands hereinafter described was \$20,872.90 and that said sum is the reasonable and just compensation to be paid for the taking of said lands by the United States of America, subject to existing easements as hereinafter mentioned; Seventh: That by order of this Court entered in this cause on the 23rd day of December, 1942, the sum of \$12,000.00 was disbursed to the defendant Harry C. Clair in partial distribution of the sum on deposit, and that there now remains on deposit in this cause and subject to disbursement the sum of \$8,872.90; Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the full fee simple title to the following described lands in Benton County, Oregon, to-wit:

Tract No. B-67

Tract 1: Beginning at Section corner to Sections 14, 15, 22 and 23, Township 10 South, Range 5 West of the Willamette Meridian, and running thence N. $0^{\circ} 2'$ W. 33.216 chains to the center of the County Road; thence S. $49^{\circ} 54'$ East 6.814 chains to the intersection of the center of the county road with the West line of Francis Writsman D.L.C. #50, thence S. $5^{\circ} 36'$ East 28.92 chains to the South line of Section 14 which is .70 chains N. $5^{\circ} 36'$ W. of the Southwest corner of said claim; thence S. $89^{\circ} 40'$ West 8.021 chains to the place of beginning, in Benton County, Oregon.

Tract 2: Also the South half of Section 15, Township 10 South Range 5 West of the Willamette Meridian, excepting the following: Beginning at a $3/4''$ pipe, the quarter section corner between Sections 14 and 15, said township and range, and running thence S. $0^{\circ} 2'$ East 6.523 chains to the center of the County Road; thence N. $49^{\circ} 54'$ W. 10.137 chains along the center of the County Road; thence S. $89^{\circ} 57'$ East 7.75 chains to the place of beginning, in Benton County, Oregon.

Tract 3: Also, the Northwest Quarter of Section 22, also the West half of the Northeast Quarter of said Section 22, also the North half of the Southwest Quarter of said Section 22, also the Northwest Quarter of the Southeast Quarter of said Section 22, all lying and being situated in Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon. [23]

Tract 4: All of the Southeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

Tract 5: Also the Northeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon, aggregating 777.7 acres, more or less;

vested in the United States of America on December 3, 1942, free and discharged of all liens and claims of any kind whatsoever, subject however to existing easements for public roads and highways, for public utilities, for railroads, for pipe lines and for water and sewage systems; and It Is Further Ordered, Adjudged and Decreed that the sum of \$20,872.90 was as of the date of the filing of the Declaration of taking on, to-wit: December 3, 1942, the fair market value of the lands hereinbefore described, and that said sum is the reasonable and just compensation to be paid by the United States of America for the taking of the full fee simple title to said lands, subject to existing easements as hereinbefore mentioned; and It Is Further Ordered that the Clerk of this Court be and he is hereby authorized and directed forthwith to pay to Harry C. Clair, 3560 N.E. Klickitat Street, Portland, Oregon, the sum of \$8,872.90 as final payment and as full settlement of all claims of said defendant against said lands or the funds on deposit herein,

said payment to be made without charging commission or poundage fees thereon, and the Clerk is directed to take the receipt of said defendant for said payment.

CLAUDE MCCOLLOCH

District Judge.

Dated at Portland, Oregon, this 7th day of June, 1943.

[Endorsed]: Filed June 7, 1943. [24]

[Title of District Court and Cause.]

TESTIMONY

Portland, Oregon, Monday, June 7, 1943,
9:50 o'clock A.M.

Before:

Honorable Claude McColloch,
Judge

Appearance:

Mr. John E. Walker,
Special Attorney, Department of Justice,
appearing for the United States of America, Petitioner.

Alva W. Person,
Court Reporter.

PROCEEDINGS

Mr. Walker: If your Honor please, I have one or two here, rather four. In the cause of the United States of America v. Harry C. Clair, and others,

Civil No. 1677, I wish to file my affidavit regarding the non-military status of W. R. Coote and wife, Theresa M. Coote, and I move for an order of default as to these defendants, for the reason that they failed to answer the petition in condemnation within the time provided by law.

For the information of the record, Mr. Coote was joined as a party defendant because of the existence of a sawmill on the property of Mr. Clair. He does not have any ownership in the land involved. And for the further information of the Court, the title deeds of Mr. Clair, the only remaining defendant in the cause, have heretofore been offered in evidence in connection with an order of partial distribution. With this order of default, the one remaining individual defendant is Harry C. [26] Clair. A petition for an order fixing value in the sum of \$20,872.90 has heretofore been filed in this cause, so at this time I would like to have Mr. Wallace sworn to testify as to value.

W. B. WALLACE

was thereupon produced as a witness in behalf of the United States of America, Petitioner, and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Walker:

Q. Mr. Wallace, by whom are you employed?

A. The Real Estate Branch of the Army Engineers.

Q. In what capacity?

(Testimony of W. B. Wallace.)

A. Chief of Claim and Appraisal Section.

Q. Are you familiar with a tract of land in the Camp Adair project known as Tract B-67 and reputedly owned by Harry C. Clair?

A. Yes, sir, I have.

Q. Have you made an appraisal of that tract of land to determine its value?

A. One was made under my supervision and direction.

Q. What is the general description of the land?

A. Some of the land is pasture, and the larger portion of it is covered by timber. There are some improvements on the property also.

Q. Based on your experience as an appraiser, and your supervision of the work of appraising this land, what in your opinion was the fair, market value of the land, improvements and timber, on December 3, 1942, the date that the Declaration of Taking was filed?

A. Assuming there was no change between the date of the appraisal, which was in April, 1942, and the date of the Declaration of Taking, the value would be \$20,872.90.

Mr. Walker: Any questions, your Honor?

The Court: Do the land owners contest it?

Mr. Walker: No. The land owner has heretofore filed a petition for an order fixing value in that amount.

The Court: Take the order.

(Witness excused.) [27]

Mr. Walker: Based on the evidence and files in this case, I move for an order fixing the value of the land taken in the sum of \$20,872.90, for an order disbursing the remaining funds on deposit in the amount of \$8,872.90, and for a final judgment in condemnation.

The Court: Take the order.

(The foregoing hearing was concluded at 9:52 o'clock A. M.)

[Endorsed]: Filed June 29, 1943. [28]

In the District Court of the United States
for the District of Oregon

Civil No. 1677

UNITED STATES OF AMERICA,

Petitioner,

vs.

HARRY C. CLAIR, et al,

Defendants.

REPORTER'S CERTIFICATE

I, Alva W. Person, do hereby certify that I reported in shorthand all of the oral proceedings had and evidence given upon the hearing in the above entitled cause on Monday, June 7, 1943, before the above entitled Court, the Honorable Claude McCulloch, Judge, presiding; that I subsequently re-

duced my shorthand notes to typewriting, and the foregoing and hereto attached four pages of typewritten matter, numbered 1 to 4, both inclusive, constitute a full, true and accurate record of said oral proceedings had and evidence given upon said hearing.

Dated at Portland, Oregon, this 23rd day of June, 1943.

ALVA W. PERSON
Court Reporter

[Endorsed]: Filed June 29, 1943. [29]

United States District Court
District of Oregon

\$8,872.90

Portland, Oregon, June 9, 1943

Received from G. H. Marsh, clerk of the District Court of the United States for the District of Oregon, the sum of Eight Thousand Eight Hundred Seventy-two and 90/100 Dollars, on account of compensation in full Cause No. Civ. 1677, United States vs. Harry C. Clair etal.

HARRY C. CLAIR

[Endorsed]: Filed June 9, 1943. [30]

[Title of District Court and Cause.]

MOTION FOR ORDER VACATING ORDER
FIXING VALUE AND DISBURSING
FUNDS AND FINAL JUDGMENT IN
CONDEMNATION

Comes now plaintiff, United States of America, by and through its attorneys of record, and moves the above entitled Court for an Order vacating the Order fixing value and disbursing funds and final judgment in condemnation heretofore entered by this Court in this cause on the 7th day of June, 1943, upon the ground and for the reason that plaintiff believes it expedient to introduce further testimony in this cause relating to the fair market value of the property, including the merchantable timber thereon, taken in this proceeding.

HARRY D. BOIVIN

Special Attorney

Department of Justice

[Endorsed]: Filed September 3, 1943. [31]

[Title of District Court and Cause.]

ORDER VACATING ORDER FIXING VALUE
AND DISBURSING FUNDS AND FINAL
JUDGMENT IN CONDEMNATION

This matter coming on for hearing upon Motion of the plaintiff, United States of America, by and through its attorneys of record, for an Order vacating the Order fixing value and disbursing funds and final judgment in condemnation, and It Appearing to the Court that plaintiff believes it expedient to introduce further testimony in this cause relating to the fair market value of the property, including merchantable timber thereon, taken in this proceeding; Now, Therefore, it is hereby Ordered that the Order fixing value and disbursing funds and final judgment in condemnation heretofore entered by this Court in this cause on the 7th day of June, 1943, be and the same is hereby set aside and vacated; and It Is Further Ordered that a copy of this Order be served by mail on all of the above named defendants in this cause.

Dated at Portland, Oregon, this 3rd day of September, 1943.

CLAUDE McCOLLOCH
District Judge

[Endorsed]: Filed September 3, 1943. [32]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury sworn and impaneled to determine the just compensation to be paid by the United States for the taking of the lands involved in this proceeding, do hereby find that the full fair market value of the lands taken herein as of the 18th day of June, 1942 is the sum of Fifteen Thousand One Hundred Dollars (\$15,100.00).

Dated at Portland, Oregon, this 8th day of December, 1943.

DORA FLOOD

Foreman

[Endorsed]: Filed December 8, 1943. [35]

In the District Court of the United States
for the District of Oregon

Civil No. 1677

UNITED STATES OF AMERICA,

Petitioner,

vs.

HARRY C. CLAIR, an unmarried man; CALIFORNIA PACIFIC TITLE INSURANCE COMPANY, a corporation; M. F. CAMPBELL; E. C. BUTMAN and JANE DOE BUTMAN, his wife, if married; C. A. HUGHES and JANE DOE HUGHES, his wife, if married;

B. H. OLDFIELD and JANE DOE OLDFIELD, his wife, if married; VICTORIA RICHARDS and JOHN DOE RICHARDS, her husband, if married; L. E. OSGOOD and JANE DOE OSGOOD, his wife, if married; ROBERT W. WALLACE and JANE DOE WALLACE, his wife, if married; JOHN WIENERT and JANE DOE WIENERT, his wife, if married; W. R. COOTE and JANE DOE COOTE, his wife, if married; and BENTON COUNTY, a municipal corporation and political subdivision of the State of Oregon,
Defendants

JUDGMENT ON VERDICT

This cause coming on regularly for trial, petitioner appearing by and through C. U. Landrum, Special Assistant United States Attorney and the defendant, Harry C. Clair, an unmarried man, appearing by and through A. K. McMahan and Mark V. Weatherford, his attorneys, and the defendant, Benton County, Oregon appearing not, a jury was thereupon duly empaneled and sworn to try the issues in said cause and by stipulation of the parties, and upon the Order of the Court the jury viewed the real property involved in this proceeding and after hearing the testimony of *of* witnesses for the petitioner and for the defendant, argument of counsel and the instructions of the Court, did retire for deliberation and after deliberating did, on the 8th day of December, 1943, return into this Court a verdict in words and figures as follows, to-wit:

[Title of District Court and Cause.]

VERDICT OF THE JURY [36]

We, the Jury sworn and impaneled to determine the just compensation to be paid by the United States for the taking of the lands involved in this proceeding, do hereby find that the full fair market value of the lands taken herein as of the 18th day of June, 1942 is the sum of Fifteen Thousand One Hundred Dollars (\$15,100.00).

Dated at Portland, Oregon, this 8th day of December, 1943.

/s/ DORA FLOOD

Foreman

Now, Therefore, by verdict of the law and by reason of the premises in said Verdict it is Ordered and Adjudged that the full fair market value of the hereinafter described real property sought to be acquired by the United States of America by and through this proceeding be and the same is hereby fixed in the sum of \$15,100.00 as of the 18th day of June, 1942, which said sum has heretofore been deposited in the Registry of this Court for the use and benefit of the persons entitled thereto; and it is Further Ordered and Adjudged that the full simple title to the following described lands situate in Benton County, Oregon, to-wit:

Tract No. B-67:

Tract 1: Beginning at Section corner to Sections 14, 15, 22 and 23, Township 10 South, Range 5 West of the Willamette Meridian, and running thence N.

0° 2' W. 33.216 chains to the center of the County Road; thence S. 49° 54' East 6.814 chains to the intersection of the center of the county road with the West line of Francis Writsman D.L.C. #50, thence S. 5° 36' East [37] 28.92 chains to the South line of Section 14 which is .70 chains N. 5° 36' W. of the Southwest corner of said claim; thence S. 89° 40' West 8.021 chains to the place of beginning, in Benton County, Oregon;

Tract 2: Also the South half of Section 15, Township 10 South, Range 5 West of the Willamette Meridian, excepting the following: Beginning at a 3/4" pipe, the quarter section corner between Sections 14 and 15, said township and range, and running thence S. 0° 2' East 6.523 chains to the center of the County Road; thence N. 49° 54' W. 10.137 chains along the center of the County Road; thence S. 89° 57' East 7.75 chains to the place of beginning, in Benton County, Oregon;

Tract 3: Also, the Northwest Quarter of Section 22, also the West half of the Northeast Quarter of said Section 22, also the North half of the Southwest Quarter of said Section 22, also the Northwest Quarter of the Southeast Quarter of said Section 22, all lying and being situated in Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon;

Tract 4: All of the Southeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon;

Tract 5: Also the Northeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon;

vested in the United States of America free and discharged of all claims of every kind whatsoever, subject, however, to existing easements for public roads and highways, for public utilities, for railroads, for pipe lines, and for water and sewage systems, on December 3, 1942, the date of the filing in this cause of the Declaration of Taking covering said lands.

JAMES ALGER FEE

District Judge

Dated at Portland, Oregon, this 8th day of December, 1943.

[Endorsed]: Filed December 18, 1943. [38]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice is hereby given that the Defendant above named, Harry C. Clair, an unmarried man, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment on verdict entered in this action on December 8, 1943.

Signed: HAMPSON, KOERNER, YOUNG
& SWETT

JAMES C. DEZENDORF

Attorneys for Appellant

Harry C. Clair, an unmarried
man.

Address: 800 Pacific Building,
Portland 4, Oregon.

[Endorsed]: Filed March 6, 1944. [39]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents, That we Harry C. Clair, an unmarried man, as principal, and American Employers' Insurance Company, a Massachusetts corporation, as surety, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said United States of America, its successors and assigns; to which payment well and truly to be made we bind ourselves, our

successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of March, 1944.

Whereas, on December 8, 1943, in an action depending in the United States District Court for the District of Oregon between the United States of America, as Petitioner, and Harry C. Clair, an unmarried man, and others, Defendants, a judgment on verdict was entered and the said Harry C. Clair having filed a notice of appeal from such judgment on verdict to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such that if the said Harry C. Clair, an unmarried man, shall prosecute his appeal to effect and shall pay costs if the appeal is dismissed or the judgment on verdict affirmed, or such costs as the said Circuit Court of Appeals may award against the said Harry C. Clair, an unmarried man, if the order or judgment is modified, or, in any other event, then

this obligation to be void; otherwise to remain [40]
in full force and effect.

Principal:

HARRY C. CLAIR

By JAMES C. DEZENDORF

One of his attorneys

Surety:

AMERICAN EMPLOYERS'

INSURANCE COMPANY,

a Massachusetts Corporation

By C. HUNT LEWIS, JR.

Attorney in Fact

By D. M. DIAMOND

Attorney in Fact

(Seal)

Countersigned:

Lewis & Cartwright, Inc.

By D. M. Diamond, Secty.

Resident Agent

[Endorsed]: Filed March 6, 1944. [41]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk, United States District Court for the District of Oregon, do *hereby that* the foregoing pages numbered from 1 to 51 inclusive, constitute the transcript of record on appeal from a judgment of said court therein numbered Civil 1677, in which the United States of America is

plaintiff and appellee, and Harry C. Clair is defendant, and appellant; that the said transcript has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof, and that it is a full, true and correct transcript of the record and proceedings had in said court and cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is \$11.95 and that the same has been paid by the appellant.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken in this cause.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 15th day of June, 1944.

(Seal) LOWELL MUNDORFF,
Clerk.

By F. L. BUCK
Chief Deputy

[Endorsed]: No. 10805. United States Circuit Court of Appeals for the Ninth Circuit. Harry C. Clair, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 19, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10805

HARRY C. CLAIR, an unmarried man, et al,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

**STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD
TO BE PRINTED**

Appellant will raise the following points on this appeal:

(1) Since the judgment heretofore entered hereon on June 7, 1943, was a consent judgment entered

pursuant to an agreement between the parties, it cannot subsequently be opened up or set aside without the consent of both parties, no showing of fraud, mutual mistake or absence of consent having been made or existing in fact.

(2) The court, on September 3, 1943, was without power to vacate or set aside the judgment entered June 7, 1943, because (a) the term during which the judgment was entered had expired, and (b) if the application to vacate and set aside the judgment entered June 7, 1943, be considered as a separate proceeding, Appellant was not afforded an opportunity to be heard and no sufficient ground was urged or existed to warrant the entry of an order vacating or setting aside the judgment of June 7, 1943.

Appellant hereby designates for printing the following portions of the certified transcript on appeal:

- (1) Petition or complaint,
- (2) Declaration of Taking,
- (3) Judgment on the declaration of taking and order of possession,
- (4) Consent to entry of final judgment and petition for partial distribution of funds,
- (5) Order for partial distribution of funds,
- (6) Receipt of Harry C. Clair for \$12,000.00,
- (7) Order fixing value and disbursing funds and final judgment in condemnation,
- (8) Transcript of testimony given at June 7, 1943, hearing,
- (9) Receipt of Harry C. Clair for \$8,872.90,

(10) Motion for order vacating order fixing value and disbursing funds and final judgment in condemnation,

(11) Order vacating order fixing value and disbursing funds and final judgment in condemnation,

(12) Verdict of the jury,

(13) Judgment on verdict,

(14) Notice of appeal,

(15) Bond for Costs on Appeal.

HAMPSON, KOERNER,

YOUNG & SWETT

JAMES C. DEZENDORF

Attorneys for Appellant

Harry C. Clair,

800 Pacific Building,

Portland 4, Oregon.

State of Oregon

County of Multnomah—ss.

Service of the foregoing Statement of Points on which Appellant Intends to Rely on Appeal and Designation of Record to Be Printed by copy, as prescribed by law, is hereby admitted at Portland, Oregon, this 26th day of June, 1944.

STANLEY R. DARLING

Of Attorneys for Appellee

By BERT C. BOYLAN

No. 10805

United States
Circuit Court of Appeals
For the Ninth Circuit.

HARRY C. CLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

1914-15-16

1915-16-17

1916-17-18-19

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

HAMPSON, KOERNER, YOUNG & SWETT, and
JAMES C. DEZENDORF,

Pacific Building,
Portland, Oregon,

Attorneys for Appellant.

BERNARD H. RAMSEY,

Special Assistant to Attorney General,

JOHN E. WALKER,
STANLEY R. DARLING,
JAMES LEAVY,
BERT C. BOYLAN and
HARRY D. BOIVIN,

Special Attorneys, Department of Justice,
525 Corbett Building,
Portland, Oregon,

Attorneys for Appellee.

In the District Court of the United States
for the District of Oregon

Civil No. 1677

UNITED STATES OF AMERICA,
Petitioner,
vs.

HARRY C. CLAIR, an unmarried man, et al,
Defendants.

SHOWING IN OPPOSITION TO MOTION
FOR ENTRY OF FINAL JUDGMENT IN
CONDEMNATION

Comes now the Defendant, Harry C. Clair, and in opposition to the Government's motion for the entry of final judgment in condemnation respectfully shows:

(1) That there has already been entered herein, on the 8th day of December, 1943, a judgment on verdict and the term during which said judgment on verdict was entered has expired, and

(2) That Plaintiff now concedes that there was no fraud in connection with the entry of the original order fixing value and disbursing funds and final judgment in condemnation entered herein on June 7, 1943, as is evidenced by the statement of Norman M. Littell, Assistant Attorney General in charge of the Lands Division, which is attached hereto, marked Exhibit "A", and made a part hereof.

This showing is based upon the record and files

herein and the affidavit of James C. Dezendorf, which is attached hereto.

JAMES C. DEZENDORF,
Of Attorneys for Defendant.
HARRY C. CLAIR,
800 Pacific Building,
Portland 4, Oregon.

[Endorsed]: Filed June 6, 1944. [1*]

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES C. DEZENDORF

State of Oregon

County of Multnomah—ss.

I, James C. Dezendorf, being first duly sworn, depose and say:

That on March 19, 1944, there appeared in the Sunday Oregonian and Sunday Journal stories, copies of which are attached as Exhibits 1 and 2 respectively. On Monday morning, March 20, 1944, I inquired at the Oregon Journal upon what the story appearing in the Sunday paper (which is Exhibit 2) was based, and I was handed a statement by Norman M. Littell (which is attached hereto as Exhibit "A") and was informed that it was delivered to the Oregon Journal by the United States Attorney's office in Portland, Oregon, for release in the Sunday papers of March 19, 1944.

JAMES C. DEZENDORF

*Page numbering appearing at foot of page of original certified Transcript of Record.

Subscribed and sworn to before me this 6th day of June, 1944.

[Seal]

DOROTHY THAIN,

Notary Public for Oregon.

My commission expires Dec. 20, 1944. [2]

EXHIBIT A

Statement By Norman M. Littell, Assistant Attorney General in Charge of the Lands Division, Regarding the Camp Adair Cases, Camp Adair, Oregon

In August and September 1943, questions were raised as to the valuation of timber lands embraced in condemnation proceedings to acquire approximately 47,000 acres of land on which Camp Adair is located. I immediately requested a complete investigation by the F.B.I., relying on their usual policy of "hewing to the line and letting the chips fall where they may." It is only fair to all concerned to state that the results of that investigation by the F.B.I. are now in, and that there is no evidence of fraud, collusion or conspiracy to defraud the Government.

However, in addition to requesting an F.B.I. investigation, I also caused a new timber cruise to be made by Henry Thomas of Portland, Oregon, because the agreed settlement of certain cases which representatives of this department had made upon instructions of the War Department, had been based upon timber cruises in which the estimate of merchantable timber were said to be excessive. The original cruises were made by the firm of Mason and

Bruce. The new cruises showed a marked reduction in the amount of merchantable timber. While it is entirely possible for experts to have differences of opinion as to such estimates, and as to values, particularly when the subject matter involves as many complications and uncertain factors as does the valuation of timber lands in the area in which Camp Adair is located, it nevertheless seems quite evident that every possible stick of timber, standing or down, was included in the original cruise as a basis for claims against the Government. Under the circumstances and in view of the discrepancies in these cruises, I have had no choice but to order that all cases be tried.

Quite apart of the F.B.I. investigation and the new timber cruises, I also dispatched to Portland one of the leading condemnation lawyers of the Department of Justice with instructions to look thoroughly into the entire matter, and to try the cases so that disputed values could be determined by juries. Seven cases were tried between November 29 and December 17, 1943, on the basis of the new cruises; values have been reduced in six of those cases.

It is only fair to all concerned to say that Mr. C. U. Landrum also reported no evidence of fraud or conspiracy in the conduct of the individuals connected with these transactions.

NORMAN M. LITTELL

Assistant Attorney General [3]

EXHIBIT No. 1

8 Sunday Oregonian, March 19, 1944
 3 Inquiries Refute Claim
 Of Camp Adair Site Fraud

Three separate investigative efforts have brought to light "no evidence of fraud, collusion or conspiracy to defraud the government" in connection with the valuation of timberlands condemned for establishment of Camp Adair, according to a statement issued Saturday by Norman M. Littell, assistant attorney-general in charge of the department of justice lands division.

The report of the Washington, D. C., official concurs with earlier findings of the United States attorney's office here at the conclusion of an investigation made by that agency, after questions of valuation were raised, leading to a re-hearing of the condemnation cases in federal court.

FBI Found Nothing

Littell's statement related that he requested a FBI investigation which unearthed no evidence of fraud, and also caused a new timber cruise to be made, in addition to assigning C. U. Landrum, described as "one of the leading condemnation lawyers of the department of justice" to look thoroughly into the entire matter and to try the cases so that disputed values could be determined by juries.

Seven cases were tried between November 29 and December 17, 1943, on the basis of new cruises, resulting in values being reduced in six of the cases,

Littell declared. Attorney Landrum also reported no evidence of fraud or conspiracy, he added.

Re-cruise Cuts Total

The re-cruise, ordered by Littell, was made by Henry Thomas of Portland and showed a marked reduction in the amount of merchantable timber from the original cruises, made by the firm of Mason & Bruce, Littell said.

Agreeing that it is possible for experts to hold differing opinions on such estimates in situations like the Camp Adair land where many uncertain factors and complications are involved, the assistant attorney-general added that "it seems quite evident that every possible stick of timber, standing or down, was included in the original cruise as a basis for claims against the government." [4]

EXHIBIT No. 2

Oregon Journal Sunday, March 19, 1944 A5

Adair Timber Deals on Level

The last word on the Camp Adair timber cases Saturday was pronounced by Norman M. Littell, assistant attorney general in charge of the lands division, in his statement that as a result of investigation by the FBI, a new timber cruise, and a series of trials held here before Federal Judge Fee in December, "There is no evidence of fraud or conspiracy in the conduct of the individuals connected with these transactions."

The controversy centered around seven tracts of partly cut-over timberland in the Soap Creek area of Camp Adair, for which the government, acting

after a cruise by the Portland timber engineering firm of Mason & Bruce, paid \$68,485.

Rumors that the government paid too much for the land led to Federal Judge McCulloch's ordering an investigation by Harry D. Boivin, then a lands division attorney here, and to a cruise of the land by Henry Thomas. On indications from these investigations, the two judges set aside the previous judgments and ordered the condemnation cases tried, with the result that the government finally paid \$55,500 for the lands.

The cases were tried by C. U. Landrum, a condemnation attorney from the department of justice.

In his statement that the entire proceeding was on the "up and up," Littell points out that "It is entirely possible for experts to have differences of opinion as to such estimates, and as to values, particularly when the subject matter involves as many complications and uncertain factors as does the valuation of timberlands in the Camp Adair area."

[5]

In the District Court of the United States
for the District of Oregon

Civil No. 1677

UNITED STATES OF AMERICA,

Petitioner,

vs.

HARRY C. CLAIR, an unmarried man; CALIFORNIA PACIFIC TITLE INSURANCE COMPANY, a corporation; M. F. CAMPBELL; E. C. BUTMAN and JANE DOE BUTMAN, his wife, if married; C. A. HUGHES and JANE DOE HUGHES, his wife, if married; B. H. OLDFIELD and JANE DOE OLDFIELD, his wife, if married; VICTORIA RICHARDS and JOHN DOE RICHARDS, her husband, if married; L. E. OSGOOD and JANE DOE OSGOOD, his wife, wife, if married; ROBERT W. WALLACE and JANE DOE WALLACE, his wife, if married; JOHN WIENERT and JANE DOE WIENERT, his wife, if married; W. R. COOTE and JANE DOE COOTE, his wife, if married; and BENTON COUNTY, a municipal corporation and political subdivision of the State of Oregon,

Defendants.

FINAL JUDGMENT IN CONDEMNATION

This matter coming on upon the motion of the United States of America, by and through its attor-

neys of record, for a final judgment in condemnation; And It Appearing to the Satisfaction of the Court (1) that this proceeding was instituted in accordance with and under the following Acts of Congress: the Act of August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257); the Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and Acts supplementary thereto and amendatory thereof; and the Act of August 18, 1890 (26 Stat. 316) as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U.S.C. Sec. 171) and March 27, 1942 (Public Law 507—77th Congress); (2) that the Secretary of War of the United States has selected the hereinafter described land for acquisition by the United States for use in connection with the establishment of Camp Adair, Oregon, and for such other uses as may be authorized by Congress or by Executive Order, and has determined and is of the opinion that the [6] hereinafter describe land is necessary adequately to provide for the establishment of a military training camp and for related military purposes, and that it is necessary and advantageous to the interest of the United States to acquire the hereinafter described land by condemnation under judicial process, and that by direction of the Attorney General of the United States, pursuant to the request of the Secretary of War, this condemnation proceeding was instituted pursuant to the aforementioned statutes for the purpose of acquiring the estate or interest hereinafter set forth in and to the land so selected; (3) that funds for the acquisition of said land were ap-

propriated by the Act of Congress of April 28, 1942 (Public Law 528—77th Congress); that there was deposited in the Registry of this Court the sum of \$20,872.90 as estimated just compensation for the taking of said land under declaration of taking filed December 3, 1942; (4) that the defendant, Benton County, a municipal corporation and political subdivision of the State of Oregon, has heretofore filed answer in this cause wherein it is alleged that there are no taxes due said defendant; that a disclaimer of interest and consent to entry of judgment has heretofore been filed in this cause by the defendant, California Pacific Title Insurance Company, a corporation; that an order of default has heretofore been entered in this cause as to the defendants, M. F. Campbell, Victoria Richards and John Doe Richards, her husband, if married, L. E. Osgood and Jane Doe Osgood, his wife, if married, W. R. Coote and Jane Doe Coote, whose true name is Theresa M. Coote, husband and wife; that an order of dismissal has heretofore been entered in this cause as to the defendants, E. C. Butman and Jane Doe Butman, his wife, if married, C. A. Hughes and Jane Doe Hughes, his wife, if married, B. H. Oldfield and Jane Doe Oldfield, his wife, if married; that a disclaimer of interest and consent to entry of judgment has heretofore been filed in this cause by the defendants, Robert W. Wallace and Jane Doe Wallace, whose true name is Amy F. Wallace, husband and wife, John Wienert and Jane Doe Wienert, whose [7] true name is Edna E. Wienert, husband and wife; (5) that at the time of the filing of the

aforementioned declaration of taking, the defendant, Harry C. Clair, an unmarried man, was the owner in fee simple of the land hereinafter described; (6) that by an order of this Court entered in this cause on the 7th day of June, 1943, the fair market value of the land hereinafter described was fixed in the sum of \$20,872.90 as of the 3rd day of December, 1942; (7) that by an order of this Court entered in this cause on the 3rd day of September, 1943, the order of June 7, 1943, was set aside and vacated pending the submission of further testimony relative to the fair market value of the property, including merchantable timber thereon, and thereafter this cause was set down for trial; (8) that heretofore and on the 8th day of December, 1943, the jury impaneled to try the issue of compensation in this case returned a verdict wherein said jury found the full fair market value of the land hereinafter described to be the sum of \$15,100.00 as of the 18th day of June, 1942; (9) that heretofore and on the 23rd day of December, 1942, there was disbursed from the Registry of this Court in this cause the sum of \$12,000.00 to the defendant, Harry C. Clair, and that by order of this Court entered in this cause on the 7th day of June, 1943, there was disbursed to the defendant, Harry C. Clair, the sum of \$8,872.90; Now, Therefore, it is by the Court at this time Ordered, Adjudged and Decreed that the full fee simple title to the following described land in Benton County, Oregon, to-wit:

Tract No. B-67:

Tract 1. Beginning at Section corner to Sections 14, 15, 22 and 23, Township 10 South, Range 5 West of the Willamette Meridian, and running thence N. $0^{\circ} 2' W.$ 33.216 chains to the center of the County Road; thence S. $49^{\circ} 54'$ East 6.814 chains to the intersection of the center of the county road with the West line of Francis Writsman D.L.C. #50, thence S. $5^{\circ} 36'$ East 28.92 chains to the South line of Section 14 which is .70 chains N. $5^{\circ} 36'$ W. of the Southwest corner of said claim; thence S. $89^{\circ} 40'$ West 8.021 chains to the place of beginning, in Benton County, Oregon.

Tract 2. Also the South half of Section 15, Township 10 South, Range 5 West of the Willamette Meridian, excepting the following: Beginning at a $\frac{3}{4}$ " pipe, the quarter section corner between Sections 14 and 15, said township and range, and running thence [8] S. $0^{\circ} 2'$ East 6.523 chains to the center of the County Road; thence N. $49^{\circ} 54'$ W. 10.137 chains along the center of the County Road; thence S. $89^{\circ} 57'$ East 7.75 chains to the place of beginning, in Benton County, Oregon.

Tract 3. Also, the Northwest Quarter of Section 22, also the West half of the Northeast Quarter of said Section 22, also the North half of the Southwest Quarter of said Section 22, also the Northwest Quarter of the Southeast Quarter of said Section 22, all lying and being situated in Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

Tract 4. All of the Southeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

Tract 5. Also the Northeast Quarter of the Northeast Quarter of Section 21, Township 10 South, Range 5 West of the Willamette Meridian, in Benton County, Oregon.

The above described lands aggregate 777.7 acres, more or less; vested in the United States of America on December 3, 1942, free and clear of all liens, encumbrances, taxes, assessments, or charges of any kind whatsoever, subject, however, to existing easements for public roads and highways, for public utilities, for railroads, for pipe lines, and for water and sewage systems; and it is Further Ordered, Adjudged and Decreed that the full fair market value of the land hereinbefore described as of the 18th day of June, 1942, was the sum of \$15,100.00, and that said sum of \$15,100.00, together with the sum of \$415.25, representative of interest at the rate of 6% per annum on the sum of \$15,100.00 from the 18th day of June, 1942, to the 3rd day of December, 1942, or the aggregate sum of \$15,515.25, is the full amount of compensation to be paid by the United States of America for the taking of said land; and it is Further Ordered, Adjudged and Decreed that the United States of America have and it is hereby given judgment against said defendant, Harry C. Clair, in the sum of \$5,357.65 with interest at the rate of 6% per annum from December 8, 1943 until said judgment shall be paid.

JAMES ALGER FEE,

District Judge.

Dated at Portland, Oregon, this 12 day of June, 1944.

[Endorsed]: Filed June 14, 1944. [9]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Defendant above named, Harry C. Clair, an unmarried man, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Final Judgment in Condemnation entered in this action on June 12, 1944.

HAMPSON, KOERNER, YOUNG
& SWETT,

Signed: JAMES C. DEZENDORF,

Attorneys for Appellant Harry
C. Clair, an unmarried man.

Address: 800 Pacific Building,
Portland 4, Oregon.

[Endorsed]: Filed June 26, 1944. [10]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Known All Men By These Presents, that we Harry C. Clair, an unmarried man, as principal, and American Employers' Insurance Company, a Massachusetts Corporation, as surety, are held and firmly bound unto United States of America in the full and just sum of two Hundred Fifty (\$250.00) Dollars, to be paid to the said United States of America, its successors and assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of June, 1944.

Whereas, on June 12, 1944, in an action depending in the United States District Court for the District of Oregon between the United States of America, as Petitioner, and Harry C. Clair, an unmarried man, and others, Defendants, a Final Judgment in Condemnation was entered and the said Harry C. Clair having filed a notice of appeal from such Final Judgment in Condemnation to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such that if the said Harry C. Clair, an unmarried man, shall prosecute his appeal to effect and shall pay costs if the appeal is dismissed or the Final Judgment in Condemnation affirmed, or such costs as the said Circuit Court of Appeals may award against the said Harry C. Clair, [11] an unmarried man, if the Final Judgment in Condemnation is modified, or,

in any other event, then this obligation is to be void; otherwise to remain in full force and effect.

Principal:

JAMES C. DEZENDORF

One of his attorneys

Surety:

AMERICAN EMPLOYERS'
INSURANCE COMPANY,

a Massachusetts Corporation

By C. HUNT LEWIS, Jr.

Attorney in Fact

By D. M. DIAMOND

Attorney in Fact

[Seal]

Countersigned:

LEWIS & CARTWRIGHT, INC.

By D. M. DIAMOND

Resident Agent

[Endorsed]: Filed June 26, 1944. [12]

[Title of District Court and Cause.]

STIPULATION

Subject to the approval of the Court, it is hereby Stipulated and Agreed:

First: That the printed record on appeal, in connection with the first and second appeals herein, may be included under one cover.

Second: That Appellant and Appellee may file only one brief, including the questions raised on both the first and second appeals herein.

Third: That the transcript on appeal in the District Court, in connection with the second appeal herein, shall include only the Showing in Opposition to Motion for Entry of Final Judgment in Condemnation, Final Judgment in Condemnation, the second Notice of Appeal, the second Bond for Costs on Appeal and a duplicate original of this stipulation. [13]

Fourth: That all questions raised in both appeals may be presented at one argument.

Fifth: That Appellant may have to and including July 22, 1944, within which to file his opening brief herein.

HAMPSON, KOERNER, YOUNG
& SWETT

JAMES C. DEZENDORF

Attorneys for Appellant Harry
C. Clair, 800 Pacific Building,
Portland 4, Oregon.

STANLEY R. DARLING

Of Attorneys for Appellee, 525
Corbett Building, Portland 4,
Oregon.

[Endorsed]: Filed June 26, 1944. [14]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL (Second Appeal)

I.

If the Circuit Court of Appeals decides, upon the original appeal herein from the Judgment on Verdict, that said order is not an appealable order, then on this appeal Appellant will contend:

(1) That since the judgment heretofore entered hereon on June 7, 1943, was a consent judgment entered pursuant to an agreement between the parties, it cannot subsequently be opened up or set aside without the consent of both parties, no showing of fraud, mutual mistake or absence of consent having been made or existing in fact,

(2) That the court, on September 3, 1943, was without power to vacate or set aside the judgment entered June 7, 1943, because: (a) the term during which the judgment was entered had expired, and (b) if the application to vacate and set aside the judgment entered June 7, 1943, be considered as a separate proceeding, Appellant was not afforded an opportunity to be heard and no sufficient ground was urged or existed to warrant the entry of an order vacating or setting aside the judgment of June 7, 1943.

II.

The court erred in entering the Final Judgment in Condemnation herein on June 12, 1944, because (1) this cause was then pending on appeal from the judgment on verdict, (2) the term during which

the Judgment on Verdict was entered had expired, and (3) no showing of fraud, accident or mistake was made in connection with the entry [15] of the Judgment on Verdict and the Final Judgment in Condemnation was, in effect, a new judgment amending or setting aside the Judgment on Verdict previously entered.

HAMPSON, KOERNER, YOUNG
& SWETT

JAMES C. DEZENDORG

Attorneys for Appellant Harry
C. Clair, 800 Pacific Building,
Portland 4, Oregon.

[Endorsed]: Filed June 26, 1944 [16]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD (Second Appeal)

Comes now Harry C. Clair, Appellant herein, pursuant to Rule 75, Federal Rules of Civil Procedure, and designates the following portions of the record, proceedings and evidence to be contained in the record on appeal of the above cause:

- (1) Showing in Opposition to Motion for Entry of Final Judgment in Condemnation,
- (2) Final Judgment in Condemnation,
- (3) Notice of Appeal filed June 26, 1944,
- (4) Bond for Costs on Appeal filed June 26, 1944,

(5) Duplicate original of Stipulation filed June 26, 1944,

(6) Statement of Points upon Which Appellant Intends to Rely on the Appeal, and

(7) Designation of Contents of Record on appeal.

HAMPSON, KOERNER, YOUNG
& SWETT

JAMES C. DEZENDORF

Attorneys for Appellant Harry
C. Clair, 800 Pacific Building,
Portland 4, Oregon.

[Endorsed]: Filed June 26, 1944. [17]

United States of America,
District of Oregon.—ss.

CERTIFICATE OF CLERK

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 18 inclusive constitute the transcript on appeal from a judgment of said court in a cause therein numbered Civil 1677, in which the United States of America is plaintiff and appellee, and Harry C. Clair is defendant and appellant; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record

thereof and that the same is a full, true and correct transcript of the record and proceedings had in said court and in said cause, in accordance with the designation as the same appears of record and on file in my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is \$2.60 and that the same has been paid by the said appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said court in Portland, in said District, this 27th day of June, 1944.

[Seal] LOWELL MUNDORFF,
Clerk.

By F. L. BUCK
Chief Deputy. [18]

[Endorsed]: No. 10805. United States Circuit Court of Appeals for the Ninth Circuit. Harry C. Clair, Appellant, vs. United States of America, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 29, 1944

PAUL P. O'BRIEN

Clerk of the United States
Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10805

HARRY C. CLAIR, an unmarried man, et al,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER

Upon application of Appellant and the Court being fully advised, it is hereby Ordered that the parties herein be and they are:

First: Permitted to include, under one cover, the printed record on appeal in connection with the first and second appeals herein,

Second: Permitted to file only one brief, including a discussion of all questions raised on the two appeals herein,

Third: Permitted to omit from the transcript on appeal in the District Court all pleadings, motions and orders already included in the transcript of record on appeal heretofore filed herein, in connection with the first appeal herein, but including the Showing in Opposition to Motion for Entry of Final Judgment in Condemnation, the Final Judgment in Condemnation, the second Notice of Appeal, the second Bond for Costs on Appeal and a duplicate original of the stipulation entered herewith,

Fourth: Permitted to present orally the questions raised in the two appeals at one argument, and

It Is Further Ordered that Appellant be and he hereby is granted to and including July 22, 1944, to file his opening brief herein.

CURTIS D. WILBUR

Circuit Judge

[Endorsed]: Filed June 23, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF RECORD TO BE PRINTED. (Second Appeal)

Appellant hereby adopts as its points on appeal the statement of points appearing in the certified transcript of the record.

Appellant hereby designates for printing the entire certified transcript on appeal.

HAMPSON, KOERNER, YOUNG
& SWETT

JAMES C. DEZENDORF

Attorneys for Appellant, 800
Pacific Building, Portland,
Oregon.

Due service of the above Statement of Points is hereby accepted in Portland, Oregon, this 3rd day of July, 1944.

STANLEY R. DARLING

[Endorsed]: Filed Jul 5 1944. Paul P. O'Brien, Clerk.

No. 10805

**In the United States Circuit
Court of Appeals**

For the Ninth Circuit

HARRY C. CLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

**Upon Appeal from the District Court of the United States,
for the District of Oregon**

HAMPSON, KOERNER, YOUNG & SWETT,
JAMES C. DEZENDORF,

Attorneys for Appellant
800 Pacific Building
Portland 4, Oregon

FILED

AUG 21 1946

PAUL P. O'BRIEN,
CLERK

INDEX

	Page
Jurisdictional Statement	2
Statement of the Case	4
Specification of Error I	9
The District Court lacked power on September 3, 1943, to set aside the judgment previously entered on June 7, 1943	9
(a) The original judgment was a consent judgment entered pursuant to an agreement between the parties and it cannot subsequently be opened up or set aside without the consent of both parties, no showing of fraud, mutual mistake or absence of consent having been made or existing in fact	10
(b) A judgment voluntarily paid cannot be set aside without the consent of both parties	13
(c) The Federal Rules of Civil Procedure do not apply to condemnation actions such as this (except as to appeals) so that the trial court lost control over the June 7, 1943, judgment upon the expiration of the March term on July 4, 1943	14
(d) The Oregon Statute giving Oregon courts discretionary power to relieve a party within one year from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect is not applicable because (1) under Oregon decisions this statute does not permit the opening of a consent judgment, and (2) in any event, the practice of the Oregon courts in exercising control of their judgments will not determine the action of the Federal Court on the subject because it is a question of power, not of procedure	17
(e) If the motion of September 3, 1943, for an order vacating and setting aside the original judgment be considered as a separate proceeding, Appellant was not notified of the proceeding and had no opportunity to be heard. Surely, he is entitled to a day in court before the original consent judgment is nullified. In any event, no sufficient ground was urged or existed to warrant the entry of an order	

INDEX—Continued

Page

vacating or setting aside the original judgment either in the original case or in a separate pro- ceeding	19
---	----

Specification of Error II.....	23
--------------------------------	----

The District Court erred in entering the Final Judgment in Condemnation on June 12, 1944.....	23
--	----

(a) This cause was then pending on appeal from the Judgment on Verdict	23
---	----

(b) The term during which the Judgment on Verdict was entered had expired.....	24
---	----

(c) No showing of fraud, accident or mistake was made in connection with the application for the entry of the Judgment on Verdict and the Final Judgment in Condemnation was, in effect, a new judgment amending or setting aside the Judgment on Verdict originally entered	25
---	----

Conclusion	27
------------------	----

TABLE OF CASES

	Page
Bache v. Moe, 33 F. (2d) 976.....	19
Carpenter v. Carpenter, 213 N. C. 36, 40; 195 S. E. 5, 7.....	13
Chappell v. U. S., 160 U. S. 499, 512, 40 L. ed. 510, 514, 515....	19
Hazel-Atlas Glass Co. v. Hartford Empire Co., 88 L. ed., 936 (Adv. Ops.)	19, 20
Hume v. Bowie, 148 U. S. 245, 37 L. ed. 438.....	3, 19
In Re Dennett (C. C. A. 9th), 215 Fed. 673.....	3
Nelson v. Meehan (C. C. A. 9th), 155 Fed. 1.....	3
Phillips v. Negley, 117 U. S. 665, 29 L. ed. 1013.....	3, 19
Rogers v. Consolidated Rock Products Co. (C. C. A. 9th), 114 F. (2d) 108	24
Rothschild & Co. v. Marshall (C. C. A. 9th), 51 F. (2d) 897..	24
Schmidt v. Oregon Gold Mining Co., 28 Ore. 9, 25, 28; 40 Pac. 406, 408, 1014, 1015.....	13
Stevirmac Oil & Gas Co. v. Dittman, 245 U. S. 210, 62 L. ed. 248	3, 19
Stites v. McGee, 37 Ore. 574; 61 Pac. 1129.....	18, 20
U. S. v. 243.22 acres, 43 F. Supp. 561, 129 F. (2d) 678.....	19
U. S. v. A Certain Tract, 44 F. Supp. 712, 715.....	19
U. S. v. Miller, 317 U. S. 369, 87 L. ed. 251, 257, 258.....	19
U. S. v. Perlstein, 39 F. Supp. 965, 126 F. (2d) 789.....	15, 24
Wallace v. U. S. (C. C. A. 2d), 142 F. (2d) 240, 244.....	20

STATUTES AND TEXT BOOKS

	Page
A. L. R., note in Vol. 139, p. 422.....	12
5 Cyclopedia of Federal Procedure (original ed.), §1523, p. 107.....	16
5 Cyclopedia of Federal Procedure (original ed.), §1523, p. 109, n. 14.....	20
5 Cyclopedia of Federal Procedure (original ed.), §1523, p. 112.....	19
8 Cyclopedia of Federal Procedure (2d ed.), §3588, pp. 328, 329, n. 33 and 34.....	19
8 Cyclopedia of Federal Procedure (2d ed.), §3594, p. 339....	12
Federal Rules of Civil Procedure, Rule 81 (a) (7).....	14, 15
Freeman on Judgments, Vol. 1, §196, pp. 381-383.....	16
Freeman on Judgments, Vol. 1, §206, p. 401.....	13
Freeman on Judgments, Vol. 3, §1352, p. 2776.....	12
Harv. L. Rev., 602, 603.....	19
Judicial Code, as amended, §24 (28 U. S. C. A., §41 (1)).....	2
Judicial Code, §102 (28 U. S. C. A., §183).....	15, 24
Judicial Code, §128 (28 U. S. C. A., §225).....	2, 3
Judicial Code, §238 (28 U. S. C. A., §345).....	2
O. C. L. A., §1-1007.....	18
25 Stat. 357, 40 U. S. C. A., §257.....	2
40 U. S. C. A., §258.....	18
50 U. S. C. A., §171.....	18

No. 10805

**In the United States Circuit
Court of Appeals**

For the Ninth Circuit

HARRY C. CLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

**Upon Appeal from the District Court of the United States,
for the District of Oregon**

JURISDICTIONAL STATEMENT

This is a condemnation action brought by the United States to acquire 777.7 acres of land in Benton County, Oregon, in connection with the expansion of the Camp Adair Military Reservation.

The action was properly filed in the District Court pursuant to the Act of Congress of August 1, 1888 (25 Stat. 357, 40 U. S. C. A., §257) and Section 24 of the Judicial Code as amended (28 U. S. C. A., §41 (1)).

Two separate appeals have been taken from orders entered in the District Court in this action. By virtue of an order entered in this court on June 23, 1944, the two appeals have been consolidated for the purposes of briefing and argument.

The first appeal is taken from the Judgment on Verdict entered in the District Court on December 8, 1943.¹

This court has jurisdiction over it by virtue of Section 128 of the Judicial Code (28 U. S. C. A., §225), it being an appeal from a final order of the District Court, a direct review of which may not be had in the Supreme Court of the United States under Section 238 of the Judicial Code (28 U. S. C. A., §345).

The second appeal is from a so-called "Final Judgment in Condemnation,"² which was entered in the District Court June 12, 1944, over six months after

¹ R 44-47.

² R 65-70.

the entry of the Judgment on Verdict³ from which Appellant took its first appeal.

Appellant contends that the District Court lacked the power to enter the so-called "Final Judgment in Condemnation" on June 12, 1944—that is, that it is void. If it is void, then a direct appeal may be taken from it.⁴

If it is not void and is the final order in the proceeding, then this court has jurisdiction by virtue of Section 128 of the Judicial Code (28 U. S. C. A., §225).

³ R 44-47.

⁴ *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013; *Stevirmac Oil & Gas Co. v. Dittman*, 245 U. S. 210, 62 L. ed. 248; *Hume v. Bowie*, 148 U. S. 245, 37 L. ed. 438; *Nelson v. Meehan* (C. C. A. 9th), 155 Fed. 1; *In Re Dennett* (C. C. A. 9th), 215 Fed. 673.

STATEMENT OF THE CASE

On December 3, 1942, the Government filed in the District Court its Petition for Condemnation of the property involved.⁵ On the same date, it filed a Declaration of Taking⁶ in which \$20,872.90 is stated as the estimated just compensation. At the same time the agreed price of \$20,872.90 was deposited in the registry of the court.

On December 23, 1942, the Government filed in the proceeding Appellant's Consent to Entry of Final Judgment and Petition for Partial Distribution of Funds. This consent provides in part as follows:⁷

“* * * petitioning defendant (Appellant) does hereby agree to accept as full settlement of all claims against the United States of America and as full final and complete award of the reasonable and just compensation for the taking of the hereinbefore described lands the sum of \$20,872.90, and petitioning defendant further represents and alleges that said sum of \$20,872.90 is the full fair market value of the lands so taken; that the petitioning defendant Harry C. Clair does hereby submit himself generally to the jurisdiction of this court in this cause and does waive the right to the intervention of a jury in the above-entitled proceeding for the purpose of fixing the reason-

5 R 9.

6 R 10-15.

7 R 25, 26.

able and just compensation to be paid to said petitioning defendant for the taking of the hereinabove described lands, and does expressly agree that just compensation therefor may be fixed by this Court without reference to a jury.

“Wherefore, petitioning defendant prays for an order of this Court fixing the full fair market value and the reasonable and just compensation for the taking of the lands aforementioned at the sum of \$20,872.90 as of the date of the filing of the declaration of taking herein, and for an order of this Court directing the Clerk of this Court to pay to the petitioning defendant Harry C. Clair the sum of \$12,000.00 in partial distribution of the aforementioned sum on deposit herein, without charging commission or poundage fee thereon.

HARRY C. CLAIR.”

On the same date, an order was entered based upon the Consent and Petition for Partial Distribution of Funds directing the payment of \$12,000.00 to Appellant.⁸ On the next day, Appellant drew down the \$12,000.00.⁹

Thereafter, and on June 7, 1943, counsel for the Government presented to the court an Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation¹⁰ and called as a witness the Chief of the Claim and Appraisal Section of the Real Estate

⁸ R 27, 28.

⁹ R 28, 29.

¹⁰ R 29-36.

Branch of the Army Engineers, who testified as follows:¹¹

“Q. Based on your experience as an appraiser, and your supervision of the work of appraising this land, what in your opinion was the fair, market value of the land, improvements and timber, on December 3, 1942, the date that the Declaration of Taking was filed?

“A. Assuming there was no change between the date of the appraisal, which was in April, 1942, and the date of the Declaration of Taking, the value would be \$20,872.90.”

The court thereupon signed and entered the Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation, which recites the execution by Appellant of the Consent to Entry of Final Judgment in the amount of \$20,872.90¹² and finds that said amount is the reasonable and just compensation to be paid for the taking of Appellant's land.¹³

The order further directed the clerk to pay Appellant the sum of \$8,872.90, which, with the \$12,000.00 already drawn down by him, totals the agreed price of \$20,872.90.¹⁴

Two days thereafter, Appellant drew down the

¹¹ R 38.

¹² R 29.

¹³ R 33.

¹⁴ R 35.

\$8,872.90¹⁵ and the proceeding was closed insofar as all parties were concerned.

Thereafter, on September 3, 1943, without notice to Appellant, counsel for the Government filed a "Motion for Order Vacating Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation."¹⁶

On the same day and apparently at the same time—and likewise without notice to Appellant—the trial court entered an order purporting to vacate the Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation previously entered on June 7, 1943. Counsel for the Government was directed to mail Appellant a copy of the order.¹⁷

Appellant was thereupon forced to stand a jury trial to determine the reasonable and fair market value of his land, although he had already been paid the amount fixed and agreed upon following the entry of the Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation previously entered on June 7, 1943.

On December 8, 1943, the jury returned a verdict in Appellant's favor for \$15,100.00,¹⁸ upon which a Judgment on Verdict was immediately entered.¹⁹

In due time, Appellant appealed from the Judg-

15 R 40.

16 R 41.

17 R 42.

18 R 43.

19 R 44-47.

ment on Verdict by filing an appropriate Notice of Appeal²⁰ and Bond.²¹

About six months after the Judgment on Verdict was entered and while this first appeal was pending in this court—and without notice to Appellant—counsel for the Government presented to the trial court for signature a so-called “Final Judgment in Condemnation,” which would award the Government judgment against Appellant for the difference between the amount previously paid him and the jury’s verdict.

The trial court refused to sign the “Final Judgment in Condemnation” until Appellant was notified.

When Appellant was notified, he filed his Showing in Opposition to the Entry of Final Judgment in Condemnation,²² in which it was made to appear that the Government had disclaimed that any fraud or collusion existed in connection with the entry of the original consent judgment and hence that no possible ground existed to support the order of September 3, 1943, which purported to set aside the original consent judgment.

The trial court signed and entered the so-called “Final Judgment in Condemnation” June 12, 1944.²³ Appellant has taken a second appeal from it.

²⁰ R 48.

²¹ R 48-50.

²² R 58-64.

²³ R 65-70.

The first question to be decided is whether the trial court had the power on September 3, 1943, upon motion of the Government and without notice to Appellant, to set aside and vacate the original consent judgment entered June 7, 1943, which had been fully executed by payment to Appellant of the amount therein fixed and agreed upon.

If the trial court lacked power to set the original consent judgment aside, as Appellant contends, then all subsequent proceedings in the trial court are also void and of no effect.

SPECIFICATION OF ERROR I

THE DISTRICT COURT LACKED POWER ON SEPTEMBER 3, 1943, TO SET ASIDE THE JUDGMENT PREVIOUSLY ENTERED ON JUNE 7, 1943.

(a) The original judgment was a consent judgment entered pursuant to an agreement between the parties and it cannot subsequently be opened up or set aside without the consent of both parties, no showing of fraud, mutual mistake or absence of consent having been made or existing in fact,

(b) A judgment voluntarily paid cannot be set aside without the consent of both parties,

(c) The Federal Rules of Civil Procedure do not apply to condemnation actions such as this (except as to appeals) so that the trial court lost control over the June 7, 1943, judgment upon the expiration of the March Term on July 4, 1943,

(d) The Oregon Statute giving Oregon courts discretionary power to relieve a party within one year from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect is not applicable because (1) under

Oregon decisions this statute does not permit the opening of a consent judgment, and (2) in any event, the practice of the Oregon courts in exercising control of their judgments will not determine the action of the Federal Court on the subject because it is a question of power, not of procedure, and

(e) If the motion of September 3, 1943, for an order vacating and setting aside the original consent judgment be considered as a separate proceeding, Appellant was not notified of the proceeding and had no opportunity to be heard. Surely, he is entitled to a day in court before the original consent judgment is nullified. In any event, no sufficient ground was urged or existed to warrant the entry of an order vacating or setting aside the original judgment either in the original case or in a separate proceeding.

ARGUMENT

(a) The original judgment was a consent judgment entered pursuant to an agreement between the parties and it cannot subsequently be opened up or set aside without the consent of both parties, no showing of fraud, mutual mistake or absence of consent having been made or existing in fact.

When the Army decided to expand the Camp Adair Military Reservation, so as to include Appellant's property, the Government offered Appellant \$20,872.90 for his property and handed him the Consent to Entry of Final Judgment and Petition for Partial Distribution of Funds.²⁴

Appellant decided to accept the Government's offer and executed and returned to it the consent to accept \$20,872.90 for his land.

When Appellant's consent to accept that sum was received, the Government filed its petition to condemn

²⁴ R 21-26.

the property, the Declaration of Taking, and deposited in the registry of the court \$20,872.90, which Appellant had agreed to accept.²⁵ Thereafter, counsel for the Government filed Appellant's consent to accept \$20,872.90 and an order was entered directing payment of \$12,000.00 of the amount deposited to Appellant pending final closing of the case.²⁶

Thereafter, counsel for the Government presented to the court an order fixing the value of Appellant's land at \$20,872.90 and Final Judgment in Condemnation, which directed that the balance of the funds on hand be disbursed to Appellant.²⁷ The Government's expert thereupon testified that the agreed price of \$20,872.90 was, in fact, the reasonable and fair market value of the land.²⁸ The court thereupon signed and entered the final judgment and the proceeding was closed.

Let us now consider the finality which is accorded consent judgments such as the one entered in this action on June 7, 1943.

The authorities are unanimous in holding that such a judgment cannot subsequently be opened, changed or set aside without the assent of **both** parties, in the absence of fraud, mutual mistake or actual absence of consent.

The rule is well stated and the authorities sup-

25 R 15.

26 R 27-28.

27 R 29-36.

28 R 38.

porting it are collected in a recent A. L. R. note in Volume 139, at page 422. It is there said:

“It is a general rule that an order, judgment, or decree, entered by the court upon the consent of the parties litigant, being in the nature of a contract to which the court has given its formal approval, cannot subsequently be opened, changed, or set aside without the assent of the parties, in the absence of fraud, mutual mistake, or actual absence of consent, and then only by an appropriate legal proceeding.”

The rule is stated in somewhat different language in 8 Cyclopedia of Federal Procedure (second edition), §3594, at page 339, as follows:

“Consent judgments are in a class by themselves insofar as being subject to change or vacation is concerned. Since they rest upon contract, the agreement of the parties, the parties themselves are estopped to attack them except to show want of consent.”

Freeman in his excellent work on Judgments (Vol. 3, §1352, page 2776) says:

“A judgment by consent is an exception to the rule that a court may modify its judgments during the term. If it conforms to the agreement or stipulation, it cannot be changed or altered or set aside without the consent of the parties unless it is properly made to appear that it was obtained

by fraud or mutual mistake or that consent was not in fact given, which is practically the same thing. It will not be set aside on the ground of surprise and excusable neglect."

As is said in **Carpenter v. Carpenter**, 213 N. C. 36, 40; 195 S. E. 5, 7:

"A judgment or decree entered by consent is not the judgment or decree of the court so much as the judgment or decree of the parties, entered upon its record with the sanction and permission of the court, and being the judgment of the parties it cannot be set aside or entered without their consent."

The rule is the same in Oregon.²⁹

(b) A judgment voluntarily paid cannot be set aside without the consent of both parties.

It also should be remembered that the judgment entered June 7, 1943, was fully executed. The Government's title to Appellant's land was confirmed and Appellant was paid the price fixed and agreed upon.

In *Freeman and Judgments* (Vol. 1, §206, page 401) we find the following statement:

"But where a judgment has been voluntarily paid and satisfied of record it has been held that it cannot be set aside, at least not in the absence of special circumstances."

²⁹ *Schmidt v. Oregon Gold Mining Co.*, 28 Ore. 9, 25, 28; 40 Pac. 406, 408, 1014, 1015.

Now let us see what the District Court attempted to do to this fully executed consent judgment.

On September 3, 1943—more than three months after the entry of the judgment—counsel for the Government filed with the clerk a document designated “Motion for Vacating Order Fixing Value and Disbursing Funds and Final Judgment in Condemnation.”³⁰ The consent of Appellant was not suggested—he was not served with the motion and did not know it existed.

No fraud, mutual mistake or absence of consent was claimed or could be alleged or proven.

On the very same day—and likewise without notice to Appellant—the trial court entered an order purporting to vacate and set aside the fully executed consent judgment of June 7, 1943.³¹

Since the judgment of June 7, 1943, was a consent judgment—entered pursuant to an agreement between the parties—and since it was fully executed in all respects, it is clear under the authorities hereinabove cited that the trial court erred in attempting to summarily nullify it.

(c) The Federal Rules of Civil Procedure do not apply to condemnation actions such as this (except as to appeals) so that the trial court lost control over the June 7, 1943, judgment upon the expiration of the March Term on July 4, 1943.

30 R 41.

31 R 42.

Rule 81(a) (7) provides:

“In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable.”

Since the New Rules do not apply to the proceedings in the District Court in this action, it is necessary to determine whether the court had any control over the original consent judgment when it attempted to nullify it on September 3, 1943.

Disregarding for a moment the fact that the June 7, 1943, judgment was a consent judgment which had been fully executed, it may be conceded that prior to the adoption of the New Federal Rules and in proceedings in which they are not applicable that during the term at which an ordinary judgment is entered, the court entering it has full control over it.

However, Section 102 of the Judicial Code (28 U. S. C. A., §183) provides that terms of the United States District Court for the District of Oregon shall be held at Portland commencing on the first Mondays in March, July and November.

March 1 was the first Monday in March, 1943, so the original judgment was entered during the March term. July 5 was the first Monday in July, 1943, so the March term expired at midnight Sunday, July 4, 1943.³²

Since the Government's application to set the orig-

32 See *U. S. v. Perlstein*, 39 F. Supp. 965, 126 F. (2d) 789.

inal judgment aside was not made during the term at which it was entered, the trial court lacked the power to set it aside.

The rule is clearly stated in Vol. 5, Cyclopedia of Federal Procedure (original edition), §1523, commencing at page 107, as follows:

“During the term at which a judgment in an action at law in a federal court is entered, the court’s control over it is complete, and the general rule is that at that time it may set the judgment aside, vacate, modify, correct or annul it. It is equally true that such control ceases with the expiration of the term, and that thereafter the court cannot, as a rule, vacate or correct its judgment on motion, unless the term is continued for the purpose of the particular case. * * * The appropriate remedy to procure relief after the term in case the judgment is wrongfully or fraudulently obtained is by bill in equity.”

In Freeman on Judgments Vol. 1, §196, pages 381-383) it is said:

“All judgments regularly entered must become final at the end of the term. After that time the courts which entered them have no power to set them aside, except such as may be given by statute, unless some proceeding for that object has been commenced within the term and has been continued for hearing, or otherwise remains undisposed of.

"The interests of society demand that there should be a termination to every controversy. Courts have no power, after fully deliberating upon causes, and ascertaining and settling the rights of parties, to add clauses to their judgments authorizing the losing party to apply at a subsequent term to have the judgment against him set aside. If a vacillating, irresolute judge were allowed to thus keep causes ever within his power, to determine and redetermine them term after term, to bandy his judgments about from one party to the other, and to change his conclusions as freely and as capriciously as a chameleon may change its hues, then litigation might become more intolerable than the wrongs it is intended to redress."

It is not contended—and in any event is not the fact—that the March, 1943, term was extended for any purpose, so that it must be held that the trial court's order of September 3, 1943, is void.

- (d) **The Oregon Statute giving Oregon courts discretionary power to relieve a party within one year from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect is not applicable because (1) under Oregon decisions this statute does not permit the opening of a consent judgment, and (2) in any event, the practice of the Oregon courts in exercising control of their judgments will not determine the action of the Federal Court on the subject because it is a question of power, not of procedure.**

The Federal statutes under which this action was brought provide that the practice, pleadings, forms

and modes of proceedings shall conform as near as may be to the practice, pleadings, forms and proceedings existing at the time in like proceedings in courts of record of the state within which the District Court is held.³³

Assuming for the moment that the practice of the Oregon courts with regard to opening up or setting aside judgments is controlling, the same result is reached—the order of September 3, 1943, is void.

In Oregon the trial court loses control over its judgments with the expiration of the term.³⁴

There is an Oregon statute (§1-1007 O. C. L. A.) granting trial courts discretionary power to relieve a party within one year from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect.

When the Government sought to nullify the June 7, 1943, judgment on September 3, 1943, it made no showing of mistake, inadvertence, surprise or excusable neglect, so that it cannot benefit by this statute.

In any event, the Oregon Supreme Court has held that this statute does not permit the opening up of a consent judgment such as the one entered in this action on June 7, 1943.³⁵

Under controlling Federal decisions, it is established that the practice of the State Courts in exer-

33 40 U. S. C. A., §258; 50 U. S. C. A., §171.

34 *Stites v. McGee*, 37 Ore. 574; 61 Pac. 1129.

35 *Stites v. McGee*, 37 Ore. 574; 61 Pac. 1129.

cising control over their judgments has no relation to the power of the Federal Court in that regard.³⁶

In 5 Cyclopedia of Federal Procedure (original edition), §1523, at page 112, it is said:

“The practice of the state courts in exercising control over their judgments will not determine the action of the federal courts on the subject of setting aside or modifying judgments after the term, which is a question of power and not of procedure.”

The authorities in the Federal Courts are uniform in holding that a trial court has no power to set aside a judgment after the term.³⁷

In any event, an attempt to set aside an ordinary judgment at a subsequent term must be undertaken in a separate proceeding.³⁸

(e) If the motion of September 3, 1943, for an order vacating and setting aside the original judgment be considered as a separate proceeding, Appellant was not notified of the proceeding and had no opportunity to be heard. Surely, he is entitled to a day in court before the original consent judgment is nullified. In any event, no sufficient ground was urged or existed to warrant the entry of an order vacating or setting aside the original judgment either in the original case or in a separate proceeding.

Under both Federal and Oregon decisions, the only way that the judgment could be attacked following the

36 See 35 Harv. L. Rev. 602, 603; *U. S. v. Miller*, 317 U. S. 369, 87 L. ed. 251, 257, 258; *Chappell v. U. S.*, 160 U. S. 499, 512, 40 L. ed. 510, 514, 515; *U. S. v. 243.22 acres*, 43 F. Supp. 561, 129 F. (2d) 678; *U. S. v. A. Certain Tract*, 44 F. Supp. 712, 715; *Bache v. Moe*, 33 F. (2d) 976.

37 *Phillips v. Negley*, 117 U. S. 665, 29 L. ed. 1013; *Hume v. Bowie*, 148 U. S. 245, 37 L. ed. 438; See also 8 Cyclopedia of Federal Procedure (2nd edition) §3588, Pages 328, 329, notes 33 and 34.

38 *Stevirmac Oil & Gas Co. v. Dittman*, 245 U. S. 210, 62 L. ed. 248; *Hazel-Atlas Glass Co. v. Hartford Empire Co.* 88 L. ed. 936 (Adv. Ops.)

expiration of the March term on July 4, 1943, was by an entirely new and separate proceeding in which Appellant would be entitled to his day in court.³⁹

No such separate or independent proceeding was filed. Appellant was not even served with the application to set aside the fully executed consent judgment and the order purporting to set the judgment aside was entered without notice to him.

If the District Court's order of September 3, 1943, erasing the original consent judgment, is to be sustained, then a person may be deprived of his property without notice, without a hearing and with no recourse.

Not only did the Government fail to assert that the fully executed consent judgment was tainted with fraud—which would be required in order to warrant the court in striking it down—it has since publicly and positively proclaimed that no fraud or collusion exists or existed in connection with the original judgment in this case.

In March, 1944, the Assistant Attorney General in charge of the Lands Division handed to the Portland newspapers for publication the following statement:⁴⁰

“In August and September, 1943, questions were raised as to the valuation of timber lands embraced in condemnation proceedings to acquire

39 5 *Cyclopedia of Federal Procedure* (original edition), §1523, Page 109, Note 14; *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 88 L. ed. 936 (Adv. Ops.); *Wallace v. U. S.* (C. C. A. 2d), 142 F. (2d) 240, 244; *Stites v. McGee*, 37 Ore. 574, 61 Pac. 1129.

40 R 60, 61.

approximately 47,000 acres of land on which Camp Adair is located. I immediately requested a complete investigation by the F.B.I., relying on their usual policy of 'hewing to the line and letting the chips fall where they may.' It is only fair to all concerned to state that the results of that investigation by the F.B.I. are now in, and that there is no evidence of fraud, collusion or conspiracy to defraud the Government.

"However, in addition to requesting an F.B.I. investigation, I also caused a new timber cruise to be made by Henry Thomas of Portland, Oregon, because the agreed settlement of certain cases which representatives of this Department had made upon instructions of the War Department, had been based upon timber cruises in which the estimate of merchantable timber were said to be excessive. The original cruises were made by the firm of Mason and Bruce. The new cruises showed a marked reduction in the amount of merchantable timber. While it is entirely possible for experts to have differences of opinion as to such estimates, and as to values, particularly when the subject matter involves as many complications and uncertain factors as does the valuation of timber lands in the area in which Camp Adair is located, it nevertheless seems quite evident that every possible stick of timber, standing or down, was included in the original cruise as a basis for claims against the Government. Under

the circumstances and in view of the discrepancies in these cruises, I have had no choice but to order that all cases be tried.

“Quite apart of the F.B.I. investigation and the new timber cruises, I also dispatched to Portland one of the leading condemnation lawyers of the Department of Justice with instructions to look thoroughly into the entire matter, and to try the cases so that disputed values could be determined by juries. Seven cases were tried between November 29 and December 17, 1943, on the basis of the new cruises; values have been reduced in six of those cases.

“It is only fair to all concerned to say that Mr. C. U. Landrum also reported no evidence of fraud or conspiracy in the conduct of the individuals connected with these transactions.”

The published articles are also in the record.⁴¹

It is apparent that no principle of law, justice or reason will sustain the trial court's attempt to summarily and **ex parte** nullify a fully executed consent judgment entered at a previous term.

41 R 62-64.

SPECIFICATION OF ERROR II

THE DISTRICT COURT ERRED IN ENTERING THE FINAL JUDGMENT IN CONDEMNATION ON JUNE 12, 1944.

(a) This cause was then pending on appeal from the Judgment on Verdict,

(b) The term during which the Judgment on Verdict was entered had expired, and

(c) No showing of fraud, accident or mistake was made in connection with the application for the entry of the Judgment on Verdict and the Final Judgment in Condemnation was, in effect, a new judgment amending or setting aside the Judgment on Verdict originally entered.

ARGUMENT

(a) This cause was then pending on appeal from the Judgment on Verdict.

The Judgment on Verdict was entered herein on December 8, 1943.⁴² Within ninety days thereafter, Appellant duly took an appeal from it by filing an appropriate Notice of Appeal and Bond.⁴³ Following the receipt and filing of the verdict, there was no reason why a final judgment could not then be entered and the form of Judgment on Verdict prepared and presented by the Government was accepted as such by it, Appellant and the Court.

A timely appeal having been taken from the Judgment on Verdict, the District Court was without jurisdiction to proceed further in the case and it had no

⁴² R 44-47.

⁴³ R 48-50.

power to thereafter enter a different or additional judgment.⁴⁴

(b) The term during which the Judgment on Verdict was entered had expired.

Section 102 of the Judicial Code (28 U. S. C. A., §183) provides the terms of the United States District Court for the District of Oregon shall be held at Portland commencing on the first Mondays in March, July and November.

The verdict was received and the judgment was presented, signed and entered during the November term, 1943.

The November, 1943, term ended at midnight before the first Monday in March, 1944.⁴⁵

Since the Government did not seek to amend the Judgment on Verdict during the November, 1943, term, at which it was entered, and until after an appeal had been taken from it, the District Court had no power to enter the so-called "Final Judgment in Condemnation," which was merely an amendment of the Judgment on Verdict, so as to award the Government judgment against the Appellant for the difference between the amount originally paid Appellant in December, 1942 and June 1, 1943, and the jury's verdict.⁴⁶

If the trial court's power to set aside, alter or amend the judgment is not restricted to the period

44 *Rothschild & Co. v. Marshall* (C. C. A. 9th), 51 F. (2d) 897; *Rogers v. Consolidated Rock Products Co.* (C. C. A. 9th), 114 F. (2d) 108.

45 See *U. S. v. Perlstein*, 39 F. Supp. 965, 126 F. (2d) 789.

46 See authorities cited on Pages 18 and 19 herein.

following its original entry and up until an appeal is taken or until the term expires, there is no reason why the court could not continue entering other and different judgments in this proceeding from term to term until Appellant should become exhausted resisting their entry and in attempting to procure a final determination on appeal.

- (c) **No showing of fraud, accident or mistake was made in connection with the application for the entry of the Judgment on Verdict and the Final Judgment in Condemnation was, in effect, a new judgment amending or setting aside the Judgment on Verdict originally entered.**

If the Government's position is correct—that it is entitled to judgment against Appellant for the difference between the amount voluntarily paid following the entry of the original consent judgment and the amount of the verdict—there is no possible reason why a provision to that effect could not have been incorporated in the Judgment on Verdict entered December 8, 1943. Why such a provision was not included in the judgment entered at that time has never been disclosed. No showing of fraud, accident or mistake was made when counsel for the Government moved to have the so-called "Final Judgment in Condemnation" entered and it was then apparent from the published statement of the Assistant Attorney General in charge of the Lands Division⁴⁷ that Appel-

47 R 60, 61.

lant was not guilty of any fraud or collusion in connection with the entry of the original consent judgment, so that there was no possible justification for setting it aside.

What the Government was actually doing was asking the court to award it judgment against the Appellant for the difference between the amount previously paid Appellant and the jury's verdict, although it had the benefit of three investigations which conclusively proved that Appellant was entitled to retain the money voluntarily paid him following the entry of the Final Judgment in Condemnation on June 7, 1943.

No possible reason existed to warrant the trial court in entering the so-called "Final Judgment in Condemnation" on June 12, 1944. Appellant was guilty of no fraud or collusion or any unfair dealing in connection with the original award made on June 7, 1943, and he was guilty of no wrongdoing in connection with the entry of the Judgment on Verdict on December 8, 1943.

When the District Court attempted to enter the so-called "Final Judgment in Condemnation" of June 12, 1944, it lacked the power to do so and it is void.

CONCLUSION

The District Court lacked the power on September 3, 1943, to nullify the fully executed consent judgment entered on June 7, 1943, during a previous term. Its order of September 3, 1943, and all subsequent proceedings are void.

Obviously the District Court lacked the power on June 12, 1944, to enter the so-called "Final Judgment in Condemnation," since the November, 1943, term, during which the Judgment on Verdict was entered, had long since expired and this proceeding was then pending on appeal in this court.

Respectfully submitted,

HAMPSON, KOERNER, YOUNG & SWETT,
JAMES C. DEZENDORF,

Attorneys for Appellant.

**In the United States
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

HARRY C. CLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

**Upon Appeal from the District Court of the
United States, for the District of Oregon.**

FILED

OCT 27 1944

**HAMPSON, KOERNER, YOUNG & SWETT,
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Attorneys for Appellant,
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Portland 4, Oregon.

**PAUL P. O'BRIEN,
CLERK**

No. 10805

In the United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HARRY C. CLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the
United States, for the District of Oregon.

As counsel for the Government have pointed out in their brief, the questions presented on the appeals herein are identical with the questions raised under Specifications of Error I and VI in the companion case of E. C. Shevlin Company vs. United States of America, Appeals Nos. 10619 and 10802 in this court.

Because counsel for the Government have incorporated

in their brief in this case by reference their arguments made in connection with Specifications of Error I and VI in the Shevlin case, we desire to incorporate herein, as a reply to the Government's brief, our reply brief in the Shevlin case.

We therefore respectfully request that this court refer to the reply brief in the Shevlin case for the answer to the Government's contentions under Specifications of Error I and II herein.

Respectfully submitted,

HAMPSON, KOERNER, YOUNG & SWETT,
JAMES C. DEZENDORF,
Attorneys for Appellant.

United States
Circuit Court of Appeals

For the Ninth Circuit.

ASSOCIATED INDEMNITY CORPORATION, a
corporation, HILLCONE STEAMSHIP COM-
PANY, a corporation and SANTA CRUZ OIL
COMPANY, a corporation,

Appellants,

vs.

WARREN S. PILLSBURY, Deputy Commissioner
of the United States Employees' Compensation
Commission, for the Thirteenth District and
ALBERT V. STEFFENS,

Appellees.

Apostles on Appeal

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

AUG 14 1944

United States
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For the Ninth Circuit.

ASSOCIATED INDEMNITY CORPORATION, a
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WARREN S. PILLSBURY, Deputy Commissioner
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of California, Central Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit for Injunction Pending Appeal.....	129
Answer of Defendant Warren H. Pillsbury.....	63
Answer of Respondent Albert V. Steffen.....	57
Apostles on Appeal.....	138
Appeal Bond	133
Assignment of Error.....	118, 144
Certificate of Clerk.....	142
Citation	46
Compensation Order and Award of Compensation	41
Complaint for Injunction.....	47
Cost Bond on Appeal.....	122
Counterdesignation of Record on Appeal and Praecipe	140
Decision, Memorandum of.....	104
Decree	113
Notice of Entry of.....	115
Designation of Record on Appeal.....	145
Findings of Fact and Conclusions of Law.....	109

	Page
Memorandum of Decision.....	104
Memorandum in Opposition to Respondent's Motion for Judgment.....	84
Memorandum in Support of Defendant's Mo- tion for Judgment.....	67
Motion for Judgment, Memorandum in Sup- port of Defendant's.....	67
Memorandum in Opposition to.....	84
Names and Addresses of Proctors.....	1
Notice of Entry of Decree.....	115
Notice of Motion re Interlocutory Injunction.....	126
Notice of Motion for Summary Judgment.....	62, 65
Order for Interlocutory Injunction Pending Appeal and Fixing the Amount of Super- sedeas Bond.....	132
Order re Record on Appeal.....	137
Petition for Allowance of Appeal and for In- junction Pending Appeal.....	117
Stipulation re Record on Appeal.....	136, 147
Transcript of Testimony at Hearing:	
Sept. 10, 1943.....	2
Testimony of Albert V. Steffen.....	4
Sept. 27, 1943.....	6
Testimony of Mrs. Marybeth Peterson	34
Testimony of Albert V. Steffen.....	14, 38

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United States Employees' Compensation
Commission

Before Warren H. Pillsbury, Deputy Commissioner
13th Compensation District

Case No. 2739-1

Claim No. 1545

ALBERT V. STEFFEN,

Claimant,

vs.

HILLCONE STEAMSHIP COMPANY,

Employer,

ASSOCIATED INDEMNITY COMPANY,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING
Sept. 10, 1943

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at the offices of the Commission, at four seventeen Market Street, San Francisco, California, on Friday, the 10th day of September, 1943, at the hour of 11:00 A.M.

Appearances:

Claimant, present in person.

Defendants, represented by W. N. Mullen, Attorney-at-law.

Anita Smith, Reporter. [1*]

*Page numbering appearing at foot of page of original certified Reporter's Transcript.

Mr. Pillsbury: Further hearing on my initiative under the following circumstances:

I entered a Compensation Order on August 22nd, 1941 rejecting Mr. Steffen's claim, on the ground that his service at the time of the injury was non-maritime. The case was taken by review in the manner provided by the Statute, to the United States District Court of Southern California, which reversed my decision.

The insurance company in the case, Associated Indemnity Company, took an appeal to the Circuit Court of Appeals in which the Commission and myself did not joint. The latter court has affirmed the District Court.

Upon receipt of the affirmance I have set the matter for further hearing to ascertain if the parties have anything further to offer before the matter is resubmitted for decision.

The nature of the jurisdictional question was that claimant was employed as a watchman on a vessel which had been out of commission and laid up for some years. Earlier decisions of the lower Federal Courts which the Commission was following at the time, took the view that such service was non-maritime in character. The rule as now established in this circuit is that such service is maritime in character. [2]

ALBERT V. STEFFEN,

the claimant, recalled, previously duly sworn, testified as follows:

Mr. Pillsbury: Q. Mr. Steffen, have you returned to work since the last hearing?

A. Yes, I have.

Q. When did you return to work?

A. First was in '41—no. Wait a minute. I got out in '41. I was discharged from the hospital the 22nd day of December, 1941.

Q. And did you go back to work at that time?

A. No.

Q. When did you return to work?

A. Well, I would have to get those dates. I am sorry.

Q. It was some time in 1942? A. Yes.

Q. Do you remember what month?

A. No, I don't.

Q. Since your return to work, have you been making wages as good as those you were receiving at the time you were hurt?

A. I didn't in '42, but have in '43.

Q. Are you completely recovered from your injury at this time?

A. That would be up to the doctor.

Q. You don't know? [3]

A. No, I don't know.

Q. Do you feel any physical impairment now?

A. Oh, yes, I feel much better.

Q. You feel you can do full work now?

A. No.

Mr. Pillsbury: Mr. Mullen?

(Testimony of Albert V. Steffen.)

Mr. Mullen: Q. As far as your back is concerned, how is that?

A. I am still sleeping on the boards.

Q. Could you go back and do your watchman job as far as your back is concerned? A. Yes.

Q. I notice you have a brace on your leg. That is the thing that would hold you back at the present time, is that right? A. That's right.

Q. Have you had any further injuries or periods of disability since the latter part of '41?

A. Yes.

Mr. Pillsbury: Q. Have you had any new accidents? A. Oh, yes.

Q. New accidents? A. Yes.

Mr. Mullen: Q. When did they occur and where? Just give it generally. [4]

A. Is this a hearing? Have I a right to have counsel here?

Mr. Pillsbury: If you want to ask for postponement to have an attorney, you may do so.

The Claimant: Yes, because I might be out of line.

Mr. Pillsbury: Mr. Mullen, you want a continuance anyway. Don't take this.

(Discussion off the record.)

What is your situation, Mr. Mullen?

Mr. Mullen: I would like to have the matter continued, too.

Mr. Pillsbury: I understood you had not been able to get the record.

(Testimony of Albert V. Steffen.)

Mr. Mullen: No. It is en route from Los Angeles.

Mr. Pillsbury: The case will be continued to Tuesday, September 28th, at 10 A. M.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on September 10, 1943.

ANITA SMITH

Reporter

[Endorsed]: Filed Sept. 18, 1943. [5]

[Title of Commission and Cause.]

TRANSCRIPT OF TESTIMONY AT HEARING
Sept. 27, 1943, 10:00 A. M.

Pursuant to notice, this matter was further heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at the offices of the Commission, at four seventeen Market Street, San Francisco, California, on Monday, September 27, 1943, at the hour of 10:00 A. M.

Appearances:

Claimant, present in person and represented by
A. A. Goldstone, attorney-at-law.

Defendants, represented by W. N. Mullen, attorney-at-law.

Anita Smith, Reporter. [1]

Mr. Pillsbury: This is a continued hearing.

Mr. Goldstone reviews the transcript of the previous hearing. Don't take this.

(Off the record.)

Mr. Pillsbury: Formal discussion has just been had with reference to some questions by Mr. Mullen as to whether he may present further evidence going to the contention that claimant was not injured as claimed, to which Mr. Goldstone replies by drawing attention to the Decree of the United States District Court in this case, being the Decree of Judge H. A. Holzer, of November 9, 1942, the portion quoted being as follows:

“The parties hereto through their respective counsel, having stipulated that the liability of Respondents be determined on the issue of whether or not the service or employment of Libellant at the time he admittedly was injured was maritime in character.”

It being Mr. Goldstone's position that this portion of the Decree establishes a stipulation by the defendants, Hillecone Steamship Company and Santa Cruz Oil Company and their insurance carrier, Associated Indemnity Corporation, that if it be determined that the case was within the provisions of the Longshoremen's and Harbor Workers' Compensation Act jurisdictionally, that defendants stipulated that the fact of injury in the course of employment should be taken as an established fact or further defense thereon waived. [2]

Mr. Mullen contends that no such *stipulated* was entered into before the Court and that in any event, as I had made no finding on the fact of injury in my Compensation Order, that the Court would not have power to bind me, this not being an issue before the Court.

He also alludes to the closing paragraph of the Decision of the Circuit Court of Appeals' opinion modifying Judge Holzer's Decree to remand the matter to me for decision upon all points in issue except the matter of jurisdiction, which was established by the Circuit Court of Appeals.

My answer to these contentions is as follows:

First, in my Compensation Order I decided the case solely upon my belief that I was without jurisdiction by reason of the non-maritime character of claimant's services, as the court decisions and constructions of the Employees' Compensation Commission then stood, and I did not enter any decision upon the other issues in the case at that time.

Second, in view of this status of the proceeding, and particularly the language of the last paragraph of the Opinion of the Circuit Court of Appeals, it is now necessary for me to enter decision upon all issues raised in the proceeding before me, and that the decision of the Federal Courts does not bind me except upon the question of jurisdiction.

Third, that if the present defendants here did enter into stipulations before the Federal Courts admitting the occur- [3] rence of injury and so forth, such stipulations are relevant and may be

offered in evidence now as admissions against interest by defendants at least, or possibly with further legal effect as judicial stipulations to narrow the issues in the case at the present time.

Fourth, I am uncertain as to whether a fair construction of the language used by Judge Holzer in his opinion wholly establishes the contention of Mr. Goldstone as to the fact and scope of such stipulations, in view of Mr. Mullen's denial that such stipulations were entered into.

I would like to have Mr. Goldstone file further evidence concerning the fact and extent of such stipulations in the District Court by defendants, if such is obtainable, to throw further light upon the proper construction to be given the language of Judge Holzer.

Fifth, since this matter was tried before me fully and its merits not submitted for decision, I am not willing to allow defendants to reopen the submission of the case to offer further evidence with reference to whether claimant's injury occurred in fact or not, at least as to evidence which was or should with ordinary diligence have been produced before me prior to the submission of the matter for decision.

In other words, I do not wish to re-try issues of fact which have already been fully tried before me. If, however, there is some later discovered evidence which could not with [4] ordinary diligence have been produced at the earlier hearings, that is an-

other matter and I will consider a ruling on this if such evidence is offered and objected to.

The question as to the extent of claimant's further disability and whether due to injury since the last hearing in the case prior to my decision is wholly open for the presentation of further evidence.

Stipulated that I may write the United States Marine Hospital at San Francisco to request summary of claimant's medical and hospital history since the last information received from the Marine Hospital; also that a subpoena which Mr. Mullen had served upon the Marine Hospital to produce its files here today may be considered as dropped. That is correct, is it, you will drop the subpoena now?

Mr. Mullen: Oh, yes.

Mr. Pillsbury: Now, what does either side have further to offer? I am not quite sure who is the moving party on the present stage of the case.

Mr. Mullen: Well, it is just right back, I guess.

Mr. Pillsbury: You have asked, Mr. Mullen, opportunity to put in further testimony?

Mr. Mullen: Yes.

Mr. Pillsbury: So proceed. Before proceeding, Mr. Goldstone or Mr. Mullen, do you desire to amplify the summary I have just dictated of the discussion? [5]

Mr. Goldstone: I would like to change one word, that is the word "no" in place of "further", and

that further evidence be waived in respect to my statement as to the meaning of the stipulation.

Mr. Pillsbury: I think you had better state that more fully.

Mr. Goldstone: Will you read there the beginning of Mr. Pillsbury's statement?

(Thereupon the record was read by the reporter.)

Mr. Pillsbury: Mr. Goldstone, I suggest for clearness you restate your understanding of the stipulation referred to by Judge Holzer.

Mr. Goldstone: Yes. It is my understanding of the stipulation entered into between counsel for the respective parties in the United States District Court, that the liability of defendants be determined upon the single disputed issue of whether or not the service or employment of Libellant, Albert V. Steffen, as a watchman on the S.S. "Prentiss" at the time that he was admittedly injured was maritime in character. If his employment was maritime in character the Libellant was entitled to and should have compensation, under the Act. If his employment was not maritime in character at the time of his injury, he was not entitled to such compensation.

Mr. Pillsbury: That is, you understood that counsel for the insurance carrier in the case abandoned all defenses before [6] me other than the question of jurisdiction?

Mr. Goldstone: That is my complete understanding, openly admitted in court the man was injured

in his employment, and we rested the case on this.

Mr. Mullen: Assuming that the situation was—which I do not admit—as just stated by Mr. Goldstone in respect to the stipulation, I beg leave of this Commission that if there was such a stipulation entered into, it be withdrawn for the reason that the defendants, particularly Associated Indemnity Corporation, had not been given full information concerning this man's past as to when he had had trouble with his back, he having testified that he had never had any trouble with his back prior to this alleged injury of February, 1937.

Mr. Pillsbury: I would not presume to interject myself into the proceeding of the United States District Court to the extent of purporting to give permission to withdraw any stipulation entered into in the Court. However, if you are suggesting a request to broaden the issues before me at this time because of some fraud or concealment on the part of the claimant, I will rule on such request when made.

Mr. Mullen: Might we stipulate, Mr. Pillsbury, that as part of the record insofar as this question with respect to the stipulation and with respect to anything else that be offered, it will be held by you that will include copies of all proceedings in the United States District Court? [7]

Mr. Goldstone: I will say this in respect to that in here——

Mr. Pillsbury: Indicating what?

Mr. Goldstone: The Apostles on Appeal. I will——

Mr. Pillsbury: I can shorten that. The Apostles on Appeal and all proceedings in the Federal Courts in review of this decision, I am satisfied are all part of the present record, or that I may take judicial notice of them, but I would like to have the parties give me the necessary documents for the file.

Mr. Goldstone: By the necessary documents, you mean——

Mr. Pillsbury: Whatever there is that is relevant. Mr. Goldstone gives me a copy of the printed Apostles on Appeal in this proceeding.

Mr. Mullen: Then we will each send in our own pleadings which were printed up.

Mr. Goldstone: All the proceedings are in there.

Mr. Pillsbury: Don't take this.

(Discussion off the record.)

Mr. Pillsbury: Either side may file with me any portions of briefs in the District Court or Circuit Court of Appeals which may assist in construing the language of the District Court Decree with reference to whether or not certain suggested stipulations were entered into, and their extent. I have also previously suggested that if there is a substantial [8] issue on this question, a letter from the United States Assistant Attorney handling the case, or an affidavit from Mr. Goldstone, or both, as to the nature and extent of the stipulations entered into orally before the Court may be filed.

Mr. Goldstone: In connection——

Mr. Pillsbury: Don't take this.

(Discussion off the record.)

ALBERT V. STEFFEN,

having been previously duly sworn, testified as follows:

Mr. Mullen: Q. Mr. Steffen, have either the Hillcone Steamship Company or the Santa Cruz Oil Company, or Associated Indemnity Corporation paid you any compensation for your alleged injury of about February, 1937?

A. No, sir.

Q. Have either one of them or both of them, or any of them, any one of them, agreed to pay you any compensation?

A. Yes, sir.

Q. Who? A. Mr. Cortes, the agent.

Mr. Pillsbury: I think, Mr. Mullen, that was fully covered at the time Mr. Steffen and Mr. Cortes testified here. There was a wide difference of opinion between them at that time. [9]

Mr. Mullen: I didn't know there was any testimony on compensation. I knew there was on the medical.

Mr. Pillsbury: Well, if there is any uncertainty on that point, proceed.

Mr. Mullen: Q. You say a Mr. Cortes agreed to—— A. To take care of me.

Q. To take care of you? A. Yes, sir.

Q. By the payment of compensation or the furnishing of medical treatment, or what?

A. Both. That I would be taken care of medically, also with compensation. Not to worry about any compensation at all.

Q. Now, when did he tell you that?

(Testimony of Albert V. Steffen.)

A. Mr. Cortes made several trips up to the hospital while I was in the hospital and there he gave me several times, you know, a ten dollar bill or something like that, for cigarettes.

Q. Well, that was a gift.

A. Well, yes, sir.

Q. When was the last time he told you you would be taken care of?

A. In 1939—pardon me—that was 1940.

Mr. Goldstone: Q. That is, to the best of your recollection?

A. Yes, to the best of my recollection. [10]

Mr. Mullen: Q. About what time in 1940?

A. Just before the filing—that was just before Christmas of 1940. Mr. Mullen, there is doubt there as to whether it was '39 or '40.

Q. Well, you hadn't seen him for some time before you filed before this Commission, had you?

A. The last time I saw Mr. Cortes, he drove up there with his wife. He had just been married.

Mr. Pillsbury: Q. To the Marine Hospital in San Francisco?

A. The Marine Hospital in San Francisco, yes.

Mr. Mullen: Q. Shortly after his marriage?

A. Yes. That's the only way I could determine the date he was up there.

Q. Now, Dr. Oliver rendered a report which is a part of the record in this case, which shows you had been treating with him for some years prior to

(Testimony of Albert V. Steffen.)

1936 or '37, for a back and arthritic condition. Is that correct? A. I don't know, Dr. Oliver.

Mr. Goldstone: Just a moment now. I suggest again you are re-covering again the complete record there. I think that was all gone into in the record. Do we have to go over that again?

Mr. Pillsbury: Not if it was covered.

Mr. Mullen: I think the report was filed after the testimony.

Mr. Pillsbury: Don't take this. [11]

(Off the record.)

Mr. Mullen: Well, I will withdraw that question and ask you if you recall seeing Dr. Carroll of Long Beach, Doctor of Osteopathy?

A. That was in the third hearing, your Honor. There was a notice from the company and you said I didn't have to testify regarding Dr. Carroll because he based his opinion on records—I mean he had no records of my calling on him. He just surmised. Do you recall that? That was in the third hearing.

Mr. Pillsbury: I recall making an investigation after notification of the parties, during which I called on one or two doctors. It seems to me one was a chiropractor and I put a summary of my questions to them and the answers in the record.

The Claimant: That's right.

Mr. Goldstone: With respect to Dr. Carroll, he was making an affidavit on matters which occurred ten years before, as he said.

(Testimony of Albert V. Steffen.)

Mr. Pillsbury: There is an exhibit in the record, Exhibit "A", which is a report of C. C. Carroll, D.O., in which Dr. Carroll states that he had treated Mr. Steffen possibly twenty times, the first time dating back to 1931, and made a diagnosis of arthritis with reference to the feet, and complained of back pains throughout. Now, what is the question?

Mr. Mullen: My question is whether or not you were ever [12] treated for any back trouble prior to this alleged injury of February, 1937, by Dr. Carroll?

A. The answer is that I called on Dr. Carroll—

Mr. Goldstone: Just a moment. With respect to that, we have a further statement in the record, Mr. Pillsbury, that you rejected that evidence, if it is true that you did reject that evidence.

Mr. Pillsbury: What page?

Mr. Goldstone: My understanding is that the evidence was of such a character that you could not accept it, or you could not rely upon it. You did not accept it.

Mr. Pillsbury: I don't recall that.

Mr. Goldstone: I would like to have Mr. Steffen make a statement then at this time as to what his recollection is concerning that testimony.

Mr. Pillsbury: I think Mr. Mullen's question is relevant, nevertheless.

Q. Did you go to this Dr. Carroll for treatment for arthritis of your feet, knees and for back pains

(Testimony of Albert V. Steffen.)

a considerable number of times, commencing about 1931? A. No, sir.

Q. Did he ever treat you prior to your injury while in the employ of Hillcone Steamship Company, for anything relating to your back?

A. No, sir. [13]

Mr. Pillsbury: Proceed, Mr. Mullen.

Mr. Mullen: Q. Were you ever treated by any one for any disability of your back prior to this alleged injury of 1937? A. Yes, sir.

Q. When and where? A. In Long Beach.

Q. And about when?

A. I couldn't say that. Mr. Pillsbury has the bills for those receipts that I paid. One, if you remember, Mr. Pillsbury, was Godfrey, a medical man, and the other one was—I tried to take some treatments from a chiropractor—Sutliff or Suttle. You called on him, did you not?

Mr. Pillsbury: I don't recall. When my file comes back it will contain the memoranda of my investigation.

The Claimant: Suttle, I think it was, well, he tried for a while but couldn't treat me.

Mr. Mullen: Q. When did you go to him?

A. After the accident.

Q. You never went before? A. No.

Q. Well, my question was whether you had ever had your back treated, or had any complaint of your back prior to this alleged injury of February, 1937. A. Not that I remember.

(Testimony of Albert V. Steffen.)

Q. How is your memory? Pretty good? [14]

A. Oh, I have got a wonderful memory.

Q. Had you ever received any treatment prior to February, 1937 for rheumatism or arthritis of your feet or your knees or spine or shoulders or neck?

A. In 1932 I think—I am guessing—in Seaside Hospital, Dr. Bishop and Dr. McCoy.

Q. And they treated you for what?

A. A foot operation.

Q. Did you ever go to a Dr. Earl prior to this injury?

A. Mr. Cortes sent me over to Dr. Earl in San Diego for a nose treatment when I was burning paint off the ship, and there he got Dr. Earl to treat me on a certificate of Captain Marshall of the "Degoda." He didn't treat me for my back at all. He is an ear and nose specialist.

Q. Do I understand your testimony then, that you had never had any trouble with your back, nor any treatment for your back, prior to this incident of February, 1937?

Mr. Goldstone: May I call attention to the testimony on page 81 of the Apostles on Appeal, that the same grounds have been covered in which Mr. Pillsbury stated to Mr. Steffen, "We are only concerned with your back now primarily. A. I never had any trouble with my back before."

Mr. Mullen: Q. And you still give the same answer? A. Yes, sir.

(Testimony of Albert V. Steffen.)

Q. All right. When did you leave work after this inci- [15] dent of 1937?

A. August—I can't remember the exact day, but I know Mr. Cortes took me over to the Public Health place in San Pedro. I think it was the fore part of August.

Q. Of what year? A. '38.

Q. In other words, you worked continuously at your job from February, 1937, up to some time in August, 1938?

A. I was admitted to the U. S. Marine Hospital the 5th day of August, so it must have been the 1st or 2nd he took me up.

Q. But you did work at your regular job there from February, 1937, up until approximately the 1st of August, 1938? A. That's right.

Q. Now, when again did you next go back to work after approximately August 1, 1938?

A. I went back to work August 10, 1942.

Q. Did you do any work before that?

A. I did a little singing.

Q. Well, that's work. When did you start singing? A. I think in February of 1942.

Q. Now, what is your present condition insofar as your complaints are referable to your alleged injury of February, 1937?

Mr. Pillsbury: Wait. Let me get it clear first. Do you [16] claim that you are still disabled from labor by reason of the injury for which you are claiming compensation? A. I do not.

(Testimony of Albert V. Steffen.)

Q. When did you recover from this injury to a sufficient extent to enable you to return to work?

A. I would say in August.

Q. Of this year?

A. When I went to work over in the shipyard.

Q. This year or a year ago? A. 1942.

Q. Thirteen months ago? A. That's right.

Q. And what date in August?

A. The 10th.

Q. And you are satisfied that no compensation should be awarded you after August 10, 1942?

A. That's right.

Mr. Mullen: Q. Well, when you left the Marine Hospital, what was the condition of your back?

A. Well, I had severe pain in there at night when I would lay down and I couldn't do any lifting or any walking around to a great extent, but if I sat around during the day in my room, I could go out—they would arrange for me to go out to the various camps and when I sing a couple of numbers and act as M.C., that was all I could do. There was no chance to [17] return back to work.

Q. Did the doctors tell you anything about your ability to return to work when you left the Marine Hospital?

Mr. Goldstone: Just a moment. I think there is a record on that, your Honor.

Mr. Pillsbury: I will get a record, in any event.

Mr. Goldstone: I think we better have the record—unless the statement was made to you.

(Testimony of Albert V. Steffen.)

A. Well, it was.

Q. Then you—then I don't object to the answer.

A. Dr. Christian said I could try it and outside work would do me good if I could find some light work, but definitely very light work, and if I would take care of myself it would be all right.

Mr. Mullen: Q. What pay did you get from the singing job?

A. I think I got \$95.00 a month.

Q. And did you do any extra work?

A. Once in a while.

Q. About how much did you average in addition to the \$95.00 with your singing job?

A. Oh, it would vary. Sometimes I would pick up five or ten dollars on the side.

Q. A week? A. No—a month. [18]

Q. Then you continued to do that, did you, until you went to work in the ship yard in August, 1942? A. That's correct.

Q. And by the time you went to work in the ship yard, your back was all right?

A. Well, I wouldn't say it was perfectly all right, but I got a light job over there, pipe fitter's helper, and didn't have any lifting or climbing to do, so I got by with it.

Q. You sustained some injury there, did you?

Mr. Goldstone: I will object to anything that occurred after August 5, 1942.

Mr. Pillsbury: Sustained.

(Testimony of Albert V. Steffen.)

Mr. Mullen: Q. Did you injure your back at any time between February, 1937 and the time that you went to work on the W. P. A.? A. No.

Q. Were you involved in an automobile accident on or about the 31st day of March, 1942?

A. That's right.

Q. And did you file a complaint for damages because of injuries you received in that accident?

A. I did.

Q. And did you read the complaint which was filed in that case? A. No. [19]

Q. You did discuss this case with your attorneys, however, did you not? A. Yes.

Q. Who were they?

A. Delaney and Michelsen.

Q. And did you tell them in connection with that discussion that you had suffered a severe strain of your back? A. No, sir.

Mr. Pillsbury: That would be on March 3, 1942?

Mr. Mullen: Right.

Mr. Pillsbury: The existence of additional disability starting on that day would not necessarily entitle you to be relieved from further liability if, in fact, disability from the 1937 injury would still have continued.

Mr. Mullen: But I have here a certified copy of the complaint which I have just referred to, which I would like to offer in evidence after counsel has a chance to see it.

Mr. Goldstone: I would like to call attention to

(Testimony of Albert V. Steffen.)

the fact that there was no allegation of injury to the back contained in this complaint.

Mr. Pillsbury: Are you objecting?

Mr. Goldstone: And I object to the introduction of the complaint, upon the ground it has no bearing on the issues in this case, irrelevant, incompetent and immaterial.

Mr. Pillsbury: Yes. I don't— [20]

Mr. Mullen: Insofar as stating there is no statement here with respect to an injury to the back, I still wish to offer this in evidence as to a severe strain of his neck, strain of the shoulder and strain of the left wrist, severe nervous shock, and I have asked him whether or not he told his attorneys that he had something wrong with his back and he said he did not, but I still offer it as preliminary to questioning further—further questions I intend to ask.

Mr. Pillsbury: I do not see any relevancy to the document at this time, as it does not allege any new back injury. However, I am unable to estimate the extent to which it might be needed as a matter preliminary to such further questions. I think you should develop the matter by questions, Mr. Mullen. I will withhold my ruling.

Mr. Mullen: All right.

Q. Now, in connection with this March, 1942 affair, were you examined by Dr. Sooeey?

A. Yes, I was—the insurance company sent me over there.

(Testimony of Albert V. Steffen.)

Q. And did you discuss with Dr. Sooeey this alleged injury of February, 1937, to your back?

A. I think Dr. Sobey asked me regarding that accident when he was discussing the throat operation.

Q. Well, when he saw you, did he know about this affair of 1937, or did you tell him about it?

A. I don't remember that. [21]

Q. Did you discuss with him how long you were disabled as the result of any injury you might have sustained in 1937 to your back?

A. Oh, I think that came out through the hospital, yes.

Q. Did you tell Dr. Sooeey how long you were disabled as a result of this fall with which we are here concerned?

A. I don't remember.

Q. As a matter of fact, did you tell him you were only laid up a month as a result of your fall?

A. No.

Q. You did not tell him that?

A. No.

Q. Now, you had some injury, you say, over there at the ship yard. Is that right?

Mr. Goldstone: I have objected to any evidence concerning anything that occurred after August 5, 1942, which was sustained.

Mr. Pillsbury: What are you trying to establish, Mr. Mullen?

Mr. Mullen: Veracity of the witness.

Mr. Pillsbury: Objection sustained.

Mr. Mullen: Q. Now, in connection with this

(Testimony of Albert V. Steffen.)

complaint we have just referred to, there was a deposition taken from you, was there not, when you appeared before a Notary Public and a reporter?

[22]

A. That's right.

Q. And you were asked questions?

A. Yes.

Q. And after that deposition was written up, did you read it and did you sign it?

A. No, I never saw it.

Q. I will ask you at that deposition if you gave any testimony with respect to your back injury of 1937, or any prior time?

Mr. Goldstone: I object to that on the ground the deposition would be the best evidence.

Mr. Pillsbury: Objection overruled.

Mr. Goldstone: If you recall.

A. I don't remember about giving any such testimony.

Mr. Mullen: I ask you whether or not at that time you testified you had injured your back in the early part of 1940?

A. I don't remember whether I did or not.

Q. I will ask you whether or not at said time and place you testified that as a result of your disability, you went to the Marine Hospital in San Francisco?

Mr. Goldstone: When was this supposed to be given?

(Testimony of Albert V. Steffen.)

Mr. Mullen: The deposition was given shortly after March—March 20, 1943.

Mr. Goldstone: I submit the records at the Marine Hospital would cover all that. No matter what was said in that [23] deposition, it is immaterial what may or may not have been said.

Mr. Pillsbury: I cannot tell at this time whether the attorney may be seeking to produce in evidence admissions against interest on the part of the claimant. Proceed.

Mr. Mullen: What was the question, please?

(Thereupon the question was read by the reporter.)

Mr. Pillsbury: Did you so testify?

A. I don't remember.

Mr. Mullen: Q. Did you testify at said time and place that in December, 1941 you were discharged from that hospital? A. I don't remember.

Q. Did you then and there testify that the last you were in the Marine Hospital you were able to walk around and get about all right?

Mr. Pillsbury: Mr. Mullen, have you anything there that would be contradictory to his testimony here?

Mr. Mullen: Yes.

Mr. Pillsbury: Then I wish you would get directly to it.

Mr. Goldstone: I move to strike all this.

Mr. Pillsbury: Don't take this.

(Off the record.)

(Testimony of Albert V. Steffen.)

Mr. Pillsbury: Go ahead.

Mr. Mullen: Q. At that time did you testify that you had never had any pain in your neck prior to this alleged automobile accident of 1942? [24]

A. I don't remember.

Q. You have no recollection as to what you testified to at that deposition at all, is that right?

A. Yes, that's right.

Mr. Pillsbury: The objection to the tender in evidence of the complaint for damages in said proceeding is sustained.

Mr. Mullen: Well, I have ordered a certified copy of the transcript given at that deposition. Unfortunately the time was so short I couldn't get it.

Mr. Pillsbury: I have not heard anything in the questions and answers you read which appear to me to be inconsistent with the testimony he has given.

Mr. Mullen: That is why I want to put it in the record.

Mr. Pillsbury: Well, you are attempting to impeach the witness by contradictory statements, as I understand it, and I have heard no contradictory statements. It would not be admissible for any other purpose.

Mr. Mullen: Except he testified he hurt his back in 1940, if the deposition be correct. He said he did not sustain an injury then and in the deposition he said——

Mr. Pillsbury: Don't take this.

(Off the record.)

(Testimony of Albert V. Steffen.)

Mr. Pillsbury: Go ahead, Mr. Mullen.

Mr. Mullen: Q. Did you ever have any pain in your neck prior to the accident of 1942, the automobile accident? [25]

A. Do you want to go back to 1937?

Mr. Pillsbury: Any time before 1942.

A. Before 1942?

Mr. Mullen: Before this automobile accident.

A. That's while I was in the Marine Hospital, the doctor removed some kind of a growth from my shoulder there.

Mr. Pillsbury: Indicating left shoulder.

Mr. Mullen: Q. Had you ever had any pain in your neck or the upper part of your back prior to this automobile accident in 1942?

Mr. Goldstone: To the best of your recollection, yes or no.

A. Well, back in 1915 I would say I had an operation on my neck. Is that what you want?

Mr. Mullen: I don't know.

Mr. Pillsbury: Q. Did you have any pain in your neck before 1942?

A. Well, I would say yes.

Mr. Goldstone: May I object to the question as being too vague, indefinite and uncertain. You are speaking from the time of the man's birth.

Mr. Mullen: That he recalls, yes.

Mr. Pillsbury: Proceed, Mr. Mullen.

Mr. Mullen: Q. I ask you if you testified at the deposition I just mentioned that prior to this 1942

(Testimony of Albert V. Steffen.)

accident you [26] had never had any trouble with your neck?

Mr. Pillsbury: I am looking through the record to see if Mr. Steffen testified to a neck trouble at the hearings before me.

Mr. Goldstone: I don't recall any such matter.

Mr. Pillsbury: If he did not, then the question is irrelevant.

Mr. Goldstone: And it is objected to on that ground. I don't think there has any testimony been offered at any time by Mr. Steffen that he claimed any compensation for his neck, or that he sustained a neck injury at that time.

Mr. Pillsbury: Objection sustained.

Mr. Mullen: Q. Now, isn't it true that some years ago you had a tumor on your neck, or an abscess after a tonsilectomy?

Mr. Pillsbury: Just a minute. I don't find in his previous testimony any complaint of pain in the neck resulting from the 1937 accident.

Mr. Mullen: No. It merely goes to the dependency to be placed on this man's testimony. He testified——

Mr. Pillsbury: I don't want to take time to hear examination on irrelevant grounds merely to hear contradictions to affect credibility. Don't take this.

(Off the record.)

Mr. Mullen: Q. When you saw Dr. Sooey, did you tell him [27] you had any pain in your back as a result of your automobile accident?

(Testimony of Albert V. Steffen.)

A. I don't remember that.

Q. Did you tell Dr. Sooeey that you fell off a boat in 1935 and hurt your back? A. No.

Mr. Mullen: I think that is all, Mr. Commissioner. I would like to have this matter set down in Los Angeles, as I stated, and at that time we will offer, subject to admission, certified copy of the man's deposition which I have referred to, and a certified copy of his testimony before the Industrial Accident Commission in connection with the ship yard injury.

Mr. Goldstone: We will object to—of course, it has already been ruled upon concerning any injury since August 5.

Mr. Pillsbury: What evidence have you to offer in Los Angeles?

Mr. Mullen: That this man was complaining of his back and had trouble with his back before he went to work on this ship, and that he complained of his back while working there and prior to this alleged affair, and that he took treatments for the back.

Mr. Pillsbury: Q. Did you have any trouble with your back before this 1937 accident?

A. No, your Honor.

Mr. Pillsbury: Don't take this. [28]

(Discussion off the record.)

Mr. Pillsbury: Mr. Mullen, will you have any evidence to offer at Los Angeles relating to Mr. Steffen's condition after the hearings in 1941?

(Testimony of Albert V. Steffen.)

Mr. Mullen: No.

Mr. Pillsbury: Then I will sustain the objection to further hearing in Los Angeles, on the ground that from your offer of proof it seems that you are not offering anything except such matters as were gone into in the 1941 hearings, or were available at the time of those hearings and could have been developed further.

Mr. Mullen: They could not have been developed, some of them. I won't say that they all could not.

Mr. Pillsbury: That is the question. If there is something that you have learned of since and could not have gone into at that time reasonably, then I will grant the further hearing.

Mr. Goldstone: I think there should be a statement as to what——

Mr. Mullen: I wouldn't want to make a statement now, because all I had was telephone advice.

Mr. Pillsbury: Not for the record.

(Off the record.)

Mr. Pillsbury: Mr. Mullen, I will give you two weeks to outline to me by letter the additional information you would [29] like to offer at Los Angeles, indicating whether it related to matters which have developed since the 1942 hearings, or the discovery of any matters which could not with ordinary diligence have been followed up in the 1941 hearings. I may change my position in reference to your request if the case does go to a further medical examiner or impartial medical ex-

(Testimony of Albert V. Steffen.)

aminer and a fuller history would be advisable, but I must first decide whether there is a necessity for further medical evidence.

Mr. Mullen: Off the record.

(Discussion off the record.)

Mr. Pillsbury: Hearing open 2 weeks for such further request.

Mr. Mullen: At this time I wish to file with the Deputy Commissioner return of service of the subpoena for the Permanente Foundation Hospital in Oakland, who were to have brought their records here today, which they did not do.

(Discussion off the record.)

Mr. Pillsbury: Hearing continued to 1:30 P. M.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on September 27, 1943, at 10:00 A. M.

ANITA SMITH

Reporter

[Endorsed]: Filed 10-5-43. [30]

[Title of Commission and Cause.]

TRANSCRIPT OF TESTIMONY AT HEARING

Sept. 27, 1943

(1:30 P. M.)

Pursuant to adjournment, this matter was further heard before Warren H. Pillsbury, Deputy

Commissioner, United States Employees' Compensation Commission, at the offices of the Commission, at four seventeen Market Street, San Francisco, California, on Monday, September 27, 1943, at the hour of 1:30 P. M.

Appearances:

Claimant, present in person and represented by
A. A. Goldstone, attorney-at-law.

Defendants, represented by W. N. Mullen, attorney-at-law.

Anita Smith, Reporter. [1]

Mr. Pillsbury: All right. We will proceed.

MRS. MARYBETH PETERSON,

called by defendants, being first duly sworn, testified as follows:

Mr. Pillsbury: Q. Your name please?

A. Marybeth Peterson.

Q. And your address?

A. 2618 College Avenue, Berkeley.

Mr. Pillsbury: She is here with the hospital file of the Permanente Hospital in Oakland—the Permanente Foundation Hospital, pursuant to subpoena of September 23, 1943. Further identification waived, Mr. Goldstone?

Mr. Goldstone: Yes.

Mr. Pillsbury: Mr. Mullen offers the following portions of the hospital record for introduction in

(Testimony of Mrs. Marybeth Peterson.)

evidence: In the admission record for September 26, 1942, "Admitted 10:50 P. M. Diagnosis, cerebral concussion. 2. Intracerebral hemorrhage." Attention is called by Mr. Mullen to the following portion of the history sheet on page 3.

Mr. Goldstone: This also goes to the testimony you excluded here. It relates to another injury, another matter.

Mr. Pillsbury: I assume what Mr. Mullen desires is what he stated at that time as to previous injuries. [2]

Mr. Goldstone: Tonsilectomy is an injury? Is that what you refer to in——

Mr. Pillsbury: Don't take this.

(Off the record.)

Mr. Pillsbury: The record purports to show that claimant gave a history of no serious previous injuries other than a tonsilectomy and an automobile accident.

Mr. Goldstone: I am going to object on the ground it is incompetent, irrelevant and immaterial, made under circumstances which would destroy any effect of any statement made concerning his previous history.

Mr. Pillsbury: As the matter is purely relevant, I will overrule the objection, but will state that I do not attach much significance to it, inasmuch as he had just entered the hospital with a diagnosis of cerebral concussion and intracerebral hemorrhage.

(Testimony of Mrs. Marybeth Peterson.)

Mr. Mullen: The next item is the report of Dr. O. W. Jones, of July 21, 1943.

Mr. Pillsbury: Mr. Mullen indicates a sentence on page 1 of the report of Dr. O. W. Jones, of July 21, 1943, as marked.

Mr. Mullen: Also the first paragraph of the report.

Mr. Pillsbury: These being apparently history purported to have been given by claimant to Dr. Jones, as appearing in the report of Dr. Jones. [3]

Mr. Goldstone: I don't see any objection to that.

Mr. Mullen: And the first paragraph.

Mr. Goldstone: I will object. It has no relevancy to the question here.

Mr. Pillsbury: The objection to the first paragraph here is sustained, as the paragraph relates only to the injury of September 16, 1942, while in the employ of the Permanente Foundation.

Mr. Mullen: But it does go direct to his statement that he was unconscious when he was in the hospital.

Mr. Pillsbury: I am not interested in the nature of that injury.

Mr. Mullen: It is only referred to because the hospital entrance sheet, page 2, shows no serious injuries, after the space provided for past history.

Mr. Pillsbury: This history only purporting to be given by claimant at a later date?

Mr. Mullen: That's right.

Mr. Pillsbury: The other item on page 1 of Dr.

(Testimony of Mrs. Marybeth Peterson.)

Jones' report reads as follows: "In 1937 he fell a distance of 8 feet from a ship, landing on his back which apparently was injured, because he says that thereafter he had so-called arthritis in his back and feet."

What is the next item?

Mr. Mullen: The next matter is Dr. Lawrence's report— [4] Dr. L. V. Lawrence, of March 2nd, 1943, particularly paragraph 2, which reads as follows——

Mr. Pillsbury: You have read this, have you?

Mr. Goldstone: No, I haven't.

Mr. Mullen: The first paragraph and the second paragraph of his report.

Mr. Pillsbury: Not for the record.

(Off the record.)

Mr. Pillsbury: The first entry relates only to the blow on the head in the Permanente accident, which I think is not material. The second marked portion is as follows: "The patient's past history is not complete. He volunteered very little information concerning his past health. He apparently, however, had an acute polyarthritis in 1930. I don't know whether that was a specific arthritis or not. Otherwise, I could not discover any points in his past history which you do not have on your hospital record."

This is in the report of Dr. Lester V. Lawrence, of March 2, 1943.

Anything else?

(Testimony of Mrs. Marybeth Peterson.)

Mr. Mullen: No.

Mr. Pillsbury: The file is returned to the bearer.

Stipulated I have just telephoned the United States Marine Hospital to request information as to the date of claimant's discharge from treatment, or from the hospital. The following [5] information was given me which, again by stipulation, is now read into the record:

"Discharged December 22, 1941 from hospital, fit for light duty. Prognosis guarded, but further improvement expected. Never saw him after that."

I am also informed by the Marine Hospital that claimant was hospitalized there for his automobile injury of 1942, and that the following is the last entry in the hospital records for said injury with respect to the date of discharge:

"Outpatient card April 1, 1942. Full duty; to call in 2 days for X-ray report. Record shows was discharged for full duty April 1, 1942."

Mr. Mullen: I would like to recall Mr. Steffen.

ALBERT V. STEFFEN,

the claimant, recalled, testified as follows:

Mr. Mullen: Q. You have never been paid any compensation since this injury of 1937?

Mr. Pillsbury: You asked that before.

Mr. Mullen: And the answer was "No"?

Mr. Pillsbury: The answer was "No."

(Testimony of Albert V. Steffen.)

Mr. Mullen: That's all—oh, just a moment. What did Mr. Cortes promise?

A. He promised I would be taken care of. [6]

Mr. Pillsbury: Anything else?

Mr. Mullen: That's all.

Mr. Pillsbury: The hearing will be closed except for permission given Mr. Mullen to file request for further hearing at Los Angeles within two weeks, itemizing the further evidence he proposes to offer, in order the relevancy may be decided on, in view of the objection made by Mr. Goldstone to further hearing.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on September 24, 1943, at 1:30 P. M.

ANITA SMITH

Reports

[Endorsed]: Filed 10-5-43. [7]

[Title of Commission and Cause.]

Claim No. 1545

AFFIDAVIT

State of California,

County of Los Angeles—ss.

Syril E. Tipton, being first duly sworn, deposes and says:

That he is a duly licensed practicing attorney-at-law in the State of California. That he represented

the defendants in the matter of the action of Steffen vs. Hillcone Steamship Company, et al., in that certain matter before the District Court of the United States for the Southern District of California, Central Division, being Case No. 1790 H in said Court. At the time said matter was called for hearing it was stipulated that the matter might be submitted upon the record of Warren H. Pillsbury, Deputy Commissioner, 13th District, United States Employees' Compensation Commission, and it was further stipulated that the matter to be determined by the District Court was whether or not the decision of the Commissioner that the matter was not maritime in character was or was not correct.

That your affiant did not in said cause enter into any stipulation waiving any defenses that the defendants might have in said matter in the District Court or before the United States Employees' Compensation Commission.

That the only matter submitted to the District Court was whether or not the Deputy Commissioner had jurisdiction.

SYRIL S. TIPTON

Subscribed and sworn to before me this 5th day of October, 1943.

DELLA ALLAIRE

Notary Public in and for said
County and State

United States Employees' Compensation
Commission

13th Compensation District

COMPENSATION ORDER
AWARD OF COMPENSATION

Case No. 2739-1

Claim No. 1545

In the matter of the claim for compensation under
the Longshoremen's and Harbor Workers' Com-
pensation Act.

ALBERT V. STEFFEN,

Claimant,

against

HILLCONE STEAMSHIP COMPANY, and
SANTA CRUZ OIL COMPANY,

Employer,

ASSOCIATED INDEMNITY CORPORATION,
Insurance Carrier.

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, and compensation order having been entered on August 22, 1941 rejecting the claim for compensation in this proceeding upon the ground that claimant's service at the time of his injury was not maritime in character, and said order having been reviewed by the United States District Court and Circuit Court of Appeals, and said order annulled by said courts with direction to the Deputy Commissioner to take jurisdiction, and further hear-

ing having been held and the matter again submitted for decision, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That during the month of February, 1938, the claimant above named was in the employ of the employer above named, Santa Cruz Oil Company, at Long Beach in the State of California in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Associated Indemnity Corporation.

That claimant, Albert V. Steffen, was employed at said time as a ship watchman on board the S.S. "Prentiss". That during said month, the exact date not ascertainable, claimant sustained personal injury occurring in the course of and arising out of said employment and resulting in disability as follows: While descending a gangplank from said ship to the dock the gangplank fell, causing claimant to sustain a sharp contusion to his lower back. That said contusion aggravated and exacerbated a previous quiescent osteo-arthritis of the back, causing it to become painful and subsequently disabling.

That claimant orally notified Fred H. Cordes, District Manager of the employer, Hillcone Steamship Company, under whom claimant worked directly, on the day of his injury and on various occasions thereafter, that he had sustained said fall, and was in pain as a result thereof. That the employer did not

thereafter or at any time make report of said injury to the Commission or to the Deputy Commissioner of this Compensation District as required by Section 30(f) of the Longshoremen's and Harbor Workers' Compensation Act. That the claim for compensation herein has been filed within the time required by law;

That written notice of injury was not given within thirty days after the date of such injury, but that the employer had actual knowledge of the injury and that the employer has not been prejudiced by failure of claimant to give notice;

That the employer did not furnish claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act, or at all. That the employer assisted claimant in getting admission to the United States Marine Hospital as a seaman for the treatment of his condition;

That the average annual earnings of the claimant herein at the time of his injury amounted to the sum of \$1500.00;

That claimant continued in his employment with distress and under medical care until August 5, 1938, when he entered said United States Marine Hospital. His wages were paid to and including August 4, 1938. He was discharged from said Hospital on December 22, 1941, and was continuously disabled from labor until said date. During said time he was ill from heart trouble and active arthritis of the lower back, right knee, right foot and left foot. The arthritis of his lumbar spine was exacerbated by his injury and was an important

portion of his illness. The other conditions mentioned above were not the result of, or exacerbated by, said injury. Compensation due for said period, $176\frac{3}{8}$ weeks at \$19.22 a week, is \$4410.71, no part of which has been paid;

That claimant's attorney, A. A. Goldstone, of Los Angeles, has rendered legal service to claimant in the prosecution of his claim since the return of the file from the United States Circuit Court of Appeals, for which a fee is approved in the sum of \$150.00 and lien granted therefor upon compensation herein awarded. His disbursements, if any, are to be allowed for, when a statement thereof is submitted.

Upon the foregoing facts, the Deputy Commissioner makes the following:

AWARD

That the employer, Hilleone Steamship Company and Santa Cruz Oil Company, and the insurance carrier, Associated Indemnity Corporation, shall pay to the claimant compensation as follows: To claimant the sum of \$4410.71, less however the sum of \$150.00 to be deducted therefrom and paid to claimant's attorney, A. A. Goldstone, upon his lien for attorney's fee.

Given under my hand at San Francisco, California, this day of January, 1944.

WARREN H. PILLSBURY

Deputy Commissioner

13th Compensation District

WHP:eb.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order, Award of Compensation, was sent by registered mail to the claimant, to the employer and to the insurance carrier at the last known address of each as follows:

Mr. Albert V. Steffen, 456 Harrison Street,
San Francisco, California.

Hillcone Steamship Company and Santa Cruz
Oil Company, 311 California Street, San
Francisco, California.

Associated Indemnity Corporation, 332 Pine
Street, San Francisco, Calif.

By regular mail to:

Mr. A. A. Goldstone, Attorney, 325 West 8th
St., Los Angeles, California.

Mr. Wm. P. Lord, Attorney, 405 Guardian
Bldg., Portland, Oregon.

Mr. W. N. Mullen, Attorney, 315 Montgomery
Street, San Francisco, California.

U. S. Employees' Compensation Commission,
285 Madison Avenue, New York 17, N. Y.

.....
Deputy Commissioner

Mailed:, 1944.

WHP:EB:s

United States District Court
Southern District of California
Central Division

No. 3423-M—In Admiralty

HILLCONE STEAMSHIP COMPANY, a corporation,
SANTA CRUZ OIL COMPANY, a corporation,
and ASSOCIATED INDEMNITY CORPORATION, a corporation,

Complainants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission, for the Thirteenth District, and ALBERT V. STEFFEN,

Respondents.

CITATION AND ADMISSION OF SERVICE

The United States of America to the respondents Warren H. Pillsbury, Deputy Commissioner of the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and Albert V. Steffen, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Ninth Circuit, to be holden at the Post Office Building, in the City and County of San Francisco, State of California, within forty (40) days from the date hereof, pursuant to a petition for appeal filed in the Clerk's office of the District Court of the United States, for the Southern District of California, Central Division; wherein the Associated

Indemnity Corporation, a corporation, and the Hillcone Steamship Company, a corporation, and Santa Cruz Oil Company, a corporation, are the libellant-appellants, and Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, and Albert V. Steffen, are the respondent-appellees, to show cause, if any there be, why the decree and order in said petition for appeal [2] mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the County of Los Angeles, in the District and Circuit aforesaid, this 15th day of May, 1944, and in the independence of America the One Hundred and Sixty-eighth year.

PAUL McCORMICK

United States District Judge for the
Southern District, Central Division

Receipt of copy of the within citation and admission of service is hereby acknowledged this 15 day of May, 1944.

RONALD WALKER

Asst. U. S. Atty.

Attorney for Respondent
Warren H. Pillsbury

[Endorsed]: Filed May 15, 1944. [3]

[Title of District Court and Cause.]

COMPLAINT FOR INJUNCTION

Complainants complain of respondents above named as follows:

I.

Complainant Hillcone Steamship Company is and at all times herein mentioned, has been a corporation having its principal place of business in the City and County of San Francisco.

That complainant Santa Cruz Oil Company is and at all times herein mentioned, has been a corporation existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco.

That complainant Associated Indemnity Corporation was and now is an insurance corporation engaged in the writing of insur- [4] ance policies covering employees under the terms of the Longshoremen's and Harbor Workers' Compensation Act, and prior to the time hereinafter mentioned, said complainant had entered into a contract with the other complainants insuring all employees who sustained personal injuries arising out of and in the course of their employment and who were employed on the "S.S. Prentiss."

II.

That respondent Warren H. Pillsbury is and at all times herein mentioned, was a Deputy Commissioner of the United States Employees' Compensation Commission for the Thirteenth District, which includes the State of California, and as such is administering the provisions of the "Longshoremen's and Harbor Workers' Compensation Act" (Public, 803, 69th Congress; 33 U. S. Code 901-950)

with his principal office in the City and County of San Francisco, California.

III.

That during the month of February, 1937, respondent Albert V. Steffen was in the employ of the complainant Santa Cruz Oil Company as a ship watchman on board the "S.S. Prentiss", which said vessel was then and there moored in the harbor of Long Beach, California.

That thereafter said Steffen filed his claim for compensation with the respondent Pillsbury as Deputy Commissioner for an alleged injury to said respondent Steffen's back purportedly sustained by said respondent when descending and slipping on a ladder provided as a means of ingress and egress to the said steamship, "S.S. Prentiss." That said matter being placed in issue by the answer of complainants herein was thereafter heard before Pillsbury as Deputy Commissioner and said Pillsbury on the 22d day of August, 1941, made an order rejecting said claim on the ground that claimant's service at the time of his alleged injury was not of a maritime character. [5]

IV.

That thereafter said Steffen instituted a proceeding in the above-entitled court as libelant against complainants as respondents therein claiming that said matter and libelant's claim under said compensation act was of a maritime nature, which said contention of Steffen was sustained by said court and

thereafter was sustained by the United States Circuit Court of Appeals, Ninth Circuit on the 9th day of July, 1943, in a decision entitled *Hillcone SS. Co., et al. vs. Steffen* and reported in 136 Fed. (2d) 965.

V.

That pursuant to said decision of the Circuit Court of Appeals, additional hearings were held before said Pillsbury on September 10, 1943, and September 27, 1943, and oral and documentary evidence was received and the matter then submitted for decision.

VI.

That thereafter on January 11, 1944, said Pillsbury filed his decision, "Compensation Order—Award of Compensation" in words and figures as follows, to wit:

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, and compensation order having been entered on August 22, 1941 rejecting the claim for compensation in this proceeding upon the ground that claimant's service at the time of his injury was not maritime in character, and said order having been reviewed by the United States District Court and Circuit Court of Appeals, and said order annulled by said courts with direction to the Deputy Commissioner to take jurisdiction, and further hearing having been held and the matter again submitted for decision, the Deputy Commissioner makes the following:

FINDINGS OF FACT

“That during the month of February, 1938, the claimant above named was in the employ of the employer above named, Santa Cruz [6] Oil Company, at Long Beach in the State of California in the 13th Compensation District, established under the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Associated Indemnity Corporation:

“That claimant, Albert V. Steffen, was employed at said time as a ship watchman on board the S.S. “Prentiss.” That during said month, the exact date not ascertainable, claimant sustained personal injury occurring in the course of and arising out of said employment and resulting in disability as follows: While descending a gangplank from said ship to the dock the gangplank fell, causing claimant to sustain a sharp contusion to his lower back. That said contusion aggravated and exacerbated a previous quiescent osteo-arthritis of the back, causing it to become painful and subsequently disabling;

“That claimant orally notified Fred H. Cordes, District Manager of the employer, Hillcone Steamship Company, under whom claimant worked directly, on the day of his injury and on various occasions thereafter, that he had sustained said fall, and was in pain as a result thereof. That the employer did not thereafter or at any time make report of said injury to the Commission or to the Deputy Commissioner of this Compensation District as re-

quired by Section 30(a) of the Longshoremen's and Harbor Workers' Compensation Act. That the claim for compensation herein has been filed within the time required by law;

"That written notice of injury was not given within thirty days after the date of such injury, but that the employer had actual knowledge of the injury and that the employer has not been prejudiced by failure of claimant to give notice;

"That the employer did not furnish claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act, or at all. That the employer assisted claimant in getting admission [7] to the United States Marine Hospital as a seaman for the treatment of his condition;

"That the average annual earnings of the claimant herein at the time of his injury amounted to the sum of \$1500.00;

"That claimant continued in his employment with distress and under medical care until August 5, 1938, when he ordered said United States Marine Hospital. His wages were paid to and including August 4, 1938. He was discharged from said hospital on December 22, 1941, and was continuously disabled from labor until said date. During said time he was ill from heart trouble and active arthritis of the lower back, right knee and left foot. The arthritis of his lumbar spine was exacerbated by his injury and was an important portion of his illness. The other conditions mentioned above were not the result of, or exacerbated by, said injury. Compen-

sation due for said period, 176 $\frac{3}{4}$ weeks at \$19.22 a week, is \$4410.71, no part of which has been paid;

“That claimant’s attorney, A. A. Goldstone, of Los Angeles, has rendered legal service to claimant in the prosecution of his claim since the return of the file from the United States Circuit Court of Appeals, for which a fee is approved in the sum of \$150.00 and lien granted therefor upon compensation herein awarded. His disbursements, if any, are to be allowed for, when a statement thereof is submitted.

“Upon the foregoing facts, the Deputy Commissioner makes the following:

AWARD

That the employer, Hillecone Steamship Company and Santa Cruz Oil Company, and the insurance carrier, Associated Indemnity Corporation, shall pay to the claimant compensation as follows: To claimant the sum of \$4410.71, less however the sum of \$150.00 to be deducted therefrom and paid to claimant’s attorney, A. A. Goldstone, upon his lien for attorney’s fee. [8]

Given under my hand at San Francisco, California, this 11th day of January, 1944.

WARREN H. PILLSBURY

Deputy Commissioner

13th Compensation District

VII.

That no proceedings for the suspension or setting aside of said compensation order filed January 11,

1944, have ever been instituted as provided in Subdivision (b) of Section 921 of said Act, or elsewhere or at all. Under the provisions of said Act, the said order became effective when filed on January 11, 1944, and except for these proceedings to suspend or set aside said order would become final at the expiration of thirty days after said January 11, 1944.

VIII.

That said compensation order is not in accordance with law in the following particulars:

(a) That there was no substantial evidence to warrant the finding of fact in said order of January 11, 1944, that the alleged injuries of respondent Steffen were sustained during the month of February, 1938.

(b) That said Pillsbury should have found, but failed to find, that the claim for the alleged injuries of Steffen was barred by the provisions of Subdivision (a) of Section 919 of 33 U. S. Code.

(c) That said Pillsbury erroneously applied to the said claim the provisions of 33 U. S. Code, Section 930(f), which said section was not added to the said Longshoremen's and Harbor Workers' Compensation Act until June 25, 1938.

(d) That there is no substantial evidence to support the finding of fact that claimant is entitled to compensation for a [9] period of $176\frac{3}{8}$ weeks at \$19.22 a week or to a total of \$4,410.71 or to any other sum.

IX.

That complainants have no adequate nor any remedy other than by this proceeding which is brought pursuant to the provisions of Section 921 of said Act which provides that if not in accordance with law, a compensation order may be suspended or set aside in whole or in part through injunction proceedings brought by any party or interest against the Deputy Commissioner making the order and instituted in the said District Court for the Judicial District in which the injury occurred, and that proceedings for suspending or setting aside of compensation order whether revoking a claim or making an award shall not be instituted otherwise than as provided in said Section 921.

X.

That all of said proceedings before the Deputy Commissioner are contained in a file of the Deputy Commissioner under claim No. 1545, case No. 2739-1, together with the testimony of all witnesses taken before the said Deputy Commissioner in connection with the alleged accident of said Steffen.

That the Deputy Commissioner should be required to file with the clerk of this court, at a time to be fixed by the court, a certified copy of all proceedings had before him, together with all exhibits, transcripts of testimony, letters and documents of every nature and description received by said Deputy Commissioner in consideration of said claim.

Wherefore, complainants pray that process in due form of law according to the course of this

Honorable Court may issue and that respondents may be cited to appear and answer all and singular the matters hereinbefore set forth and that the order of said Deputy Commissioner filed January 11, 1944 be set aside and declared a nulli- [10] ty and that a mandatory injunction be issued herein setting aside and restraining enforcement of said purported order dated January 11, 1944, and that the respondents be permanently enjoined from making or attempting to make any further orders with respect to said proceeding; that pending the hearing of the cause or in less than three days' notice to the parties interested and the Deputy Commissioner, this Honorable Court issue an interlocutory injunction allowing the stay of such payments pending the determination of this cause; and for such other further and different relief as to the Court may seem justified, and for costs incurred herein.

SYRIL S. TIPTON

Proctor for Complainants

State of California,
County of Los Angeles—ss.

Syril S. Tipton, being by me first duly sworn, deposes and says: that he is the Attorney for complainants and authorized to make this verification in the above entitled action; that he has read the foregoing Complaint for Injunction and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief and as to those matters that he believes it to be true.

That he makes this verification for and on behalf of said complainants.

SYRIL S. TIPTON

Subscribed and sworn to before me this 24 day of January, 1944.

DELLA ALLAIRE

Notary Public in and for said County
and State

[Seal]

My Commission expires October 15, 1946.

[Endorsed]: Filed Jan. 25, 1944. [11]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT

ALBERT V. STEFFEN

Comes now the respondent Albert V. Steffen, and answering the Complaint herein, admits, denies, and alleges as follows:

I.

Admits the allegations in paragraphs I and II of said complaint.

II.

Admits the allegations in paragraph III of said complaint, except as to the date of said accident, which was in February, 1938, and not in February, 1937, and except as to the manner in which said accident occurred, and in this connection this respondent alleges that a ladder extended from the

bow of the S.S. Prentiss to a pontoon adjacent to the vessel, and this was the means of access to and departure from the ship; that respondent [12] was leaving the vessel and was descending the ladder when the ladder shifted or became loosened at the place where it was attached to the bow of the boat; that the ladder "let go" and as a result, this respondent was thrown and dropped eight or ten feet from the ladder onto the pontoon, landing on his back.

Further answering said paragraph III of said complaint, as to the time and the manner in which said accident occurred this respondent refers to the transcripts of testimony taken at the hearings before the respondent Warren H. Pillsbury on February 5, 1941, March 18, 1941, April 17, 1941, September 10, 1943, and September 27, 1943 (A.M. and P.M.), a copy of which transcript duly certified is on file in the office of the Clerk of the above-entitled court, and by this reference made a part hereof.

III.

Admits the allegations contained in paragraphs IV, V, VI, and VII of said complaint.

IV.

Denies generally and specifically each and every allegation contained in paragraph VIII of said complaint except that this respondent admits that an error was made in the computation of compensation in that compensation for 176-3/7 weeks at

\$19.22 a week amounts to \$3390.95 instead of \$4410.71 as awarded.

Further answering said paragraph VIII, this respondent alleges that complainants have admitted the injury to this respondent and waived all defenses to the claim of this respondent except the jurisdictional defense as to whether the employment of this respondent at the time of his injury was maritime in character, and this respondent alleges that the issue as to the maritime character of this respondent's employment at the time of his injury was determined in favor of this respondent and adversely to complainants and that said determination has become final.

Further answering said paragraph VIII, this respondent alleges that the complainants had actual knowledge of said acci- [13] dent sustained by this respondent immediately after the occurrence of said accident; that said complainants promised and assured this respondent that this respondent would be taken care of; that complainants secured the admission of this respondent into the United States Marine Hospital; that this respondent trusted complainants and relied upon said promises and upon said conduct and was thereby lulled into a sense of security, and that complainants are estopped to assert the alleged defenses or claims contained in said paragraph VIII of said complaint or any defenses to the claim of this respondent for compensation for his injury sustained as hereinabove alleged.

V.

This respondent admits the allegations contained in paragraphs IX and X of said complaint.

For a second, separate, and distinct answer and defense to the Complaint herein, this respondent alleges as follows:

I.

That, as shown by the transcripts of testimony taken before the respondent Warren H. Pillsbury, copy of which is on file herein, the findings of fact in the compensation order complained of, except the computation in the finding as to the total amount of compensation due, are supported by the evidence and that under the law such findings are final and conclusive and not subject to judicial review.

Wherefore this respondent prays that judgment be entered herein remanding the case to the deputy commissioner for the sole purpose of making a new computation in the finding with reference to the total compensation due and that the compensation order be in all other respects affirmed, and with said judgment, that the complaint be dismissed.

A. A. GOLDSTONE and

WM. P. LORD

By A. A. GOLDSTONE

Proctors for Respondent

Albert V. Steffen [14]

State of California,

County of Los Angeles—ss.

A. A. Goldstone, being first duly sworn on behalf of the respondent Albert V. Steffen, deposes and

says: That he has read the foregoing Answer of Respondent Albert V. Steffen and knows the contents thereof, and the same is true of his own knowledge except as to matters which are therein stated on information and belief, and as to those matters that he believes it to be true; that said respondent is absent from the County of Los Angeles, where his attorney has his office, and that affiant is said respondent Albert B. Steffen's attorney and therefore makes this affidavit.

A. A. GOLDSTONE

Subscribed and sworn to before me this 10th day of March, 1944.

DON R. LEHMAN

Notary Public in and for said County
and State

[Seal]

Received copy of the within Answer this 10 day of March, 1944.

SYRIL S. TIPTON

Attorney for Complainants

Received copy of the within Answer this 10th day of Mar., 1944.

CHARLES H. CARR

U.S. Attorney

R. McKAY

Attorney for.....

[Endorsed]: Filed Mar. 10, 1944. [15]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR
SUMMARY JUDGMENT

To the Complainants Herein and to Cyril S. Tipton,
Their Attorney:

You and each of you will please take notice that on March 27, 1944, at the hour of 10:00 o'clock A.M., or as soon thereafter as counsel may be heard, the respondent Albert V. Steffen, by his attorneys, will move this Honorable Court to enter upon the pleadings and upon the record herein summary judgment in favor of this respondent, dismissing the action, and in support thereof this respondent says:

1. That as shown by the pleadings and record filed herein, the complaint does not state a cause of action or claim against this respondent upon which relief could be granted.

2. That as shown by the pleadings and record filed herein, the findings of the respondent deputy commissioner in the com- [16] pensation order complained of are supported by evidence in the transcripts of testimony taken at the hearings before the deputy commissioner and, under the law, said findings of fact are final and conclusive and not subject to judicial review.

3. That as shown by the pleadings and the record filed herein, the compensation order complained of is in all respects in accordance with the law.

4. That the pleadings show that there is no issue as to any material fact and that the respondents

are, as a matter of law, entitled to judgment as prayed for in the answer, remanding the case and dismissing the complaint.

A. A. GOLDSTONE and
WM. P. LORD

By A. A. GOLDSTONE

Proctors for Respondent
Albert V. Steffen [17]

Received copy of the within Notice this 10th day
of March, 1944.

SYRIL S. TIPTON

Attorney for Complainants

Received copy of the within Notice this 10th day
of Mar., 1944.

CHARLES H. CARR

U. S. Attorney

R. MacKAY

Attorney for.....

[Endorsed]: Filed Mar. 10, 1944. [21]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT WARREN H.
PILLSBURY, COMMISSIONER

Now comes the Respondent, Warren H. Pillsbury, deputy commissioner, United States Employees' Compensation Commission, and for his answer to the complaint herein:

1. Admits the allegations contained in paragraphs numbered 1 and 2.
2. Admits the allegations contained in paragraph

numbered 3, except as to the date of the alleged injury which was February, 1938, and not February, 1937, and except as to the manner in which the accident occurred, as to both of which facts respondent refers to the transcripts of testimony taken at the hearings before him on February 5, 1941, March 18, 1941, April 17, 1941, September 10, 1943, and September 27, 1943 (a.m. and p.m.), a copy of which transcript duly certified is on file in the office of the Clerk of the above entitled court, and by this reference made a part hereof. [22]

3. Admits the allegations contained in paragraphs numbered 4, 5, 6, and 7.

4. Denies the allegations contained in paragraph numbered 8 except that respondent admits that an error was made in the computation of compensation in that compensation for 176-3/7 weeks at \$19.22 a week amounts to \$3390.95 instead of \$4410.71 as awarded.

5. Admits the allegations contained in paragraphs numbered 9 and 10, and attaches the record considered by the deputy commissioner prior to filing of the compensation order complained of.

Further answering the complaint, the respondent deputy commissioner avers that, as shown by the transcripts of testimony taken before him, copy of which is on file herein, the findings of fact in the compensation order complained of, except the computation in the finding as to the total amount of compensation due, are supported by evidence and, under the law, such findings are final and conclusive and not subject to judicial review.

Wherefore, this respondent prays that judgment be entered herein remanding the case to the deputy commissioner to make a new computation in the finding with reference to the total compensation due and that the compensation order be in all other respects affirmed, and with such judgment, that the complaint be dismissed.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant United States

Attorney

Attorneys for Respondent

Pillsbury

[Endorsed]: Filed Mar. 15, 1944. [23]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR
SUMMARY JUDGMENT

To the Complainants Herein, and to Syril S. Tipton,
their attorney:

You and each of you will please take notice that on the 27th day of March, 1944 at the hour of ten o'clock A. M. or as soon thereafter as counsel may be heard, Respondent Warren H. Pillsbury, Deputy Commissioner, by his attorneys, will move this Honorable Court to enter upon the pleadings and upon the record herein summary judgment in favor of defendant, dismissing the action, and in support thereof respondent says:

1. That, as shown by the pleadings and record filed herein, the complaint does not state a cause of action or claim against this respondent upon which relief could be granted.

2. That, as shown by the pleadings and record filed herein, the findings of the deputy commissioner in the compensation order [24] complained of are supported by evidence in the transcripts of testimony taken at the hearings before the deputy commissioner and, under the law, said findings of fact are final and conclusive and not subject to judicial review.

3. That, as shown by the pleadings and the record filed herein, the compensation order complained of is in all respects in accordance with law.

4. That the pleadings show that there is no issue as to any material fact and that the respondents are, as a matter of law, entitled to judgment as prayed for in the answer, remanding the case and dismissing the complaint.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant United States
Attorney

Attorneys for Respondent
Pillsbury

[Endorsed]: Filed Mar. 15, 1944. [25]

[Title of District Court and Cause.]

MEMORANDUM IN SUPPORT OF DEFEND-
ANT'S MOTION FOR JUDGMENT

Plaintiffs filed this proceeding for judicial review of the administrative action under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424, 33 U.S.C.A. sec. 901, et seq.).

The facts in this case, as found by the deputy commissioner, are substantially as follows:

"That during the month of February, 1938, the claimant above named was in the employ of the employer above named, Santa Cruz Oil Company, at Long Beach in the State of California in the 13th Compensation District, established under the provisions of the Longshoreman's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Associated Indemnity Corporation;

"That claimant, Albert V. Steffen, was employed at said time as a ship watchman on board the S.S. 'Prentiss'. That during said month, the exact date not ascertainable, claimant sustained personal injury occurring in the course of and arising out of said employment and resulting in disability as follows: While descending a gangplank from said ship to the dock the gangplank fell, causing claimant to sustain a sharp contusion to his lower back. That said contusion aggravated and exacerbated a previous quiescent osteo-arthritis of

the back, causing it to become painful and subsequently disabling;

“That claimant orally notified Fred H. Cordes, District Manager of the employer, Hillcone Steamship [26] Company, under whom claimant worked directly, on the day of his injury and on various occasions thereafter, that he had sustained said fall, and was in pain as a result thereof. That the employer did not thereafter or at any time make report of said injury to the Commission or to the Deputy Commissioner of this Compensation District as required by Section 30(a) of the Longshoremen’s and Harbor Worker’s Compensation Act. That the claim for compensation herein has been filed within the time required by law;

“That written notice of injury was not given within thirty days after the date of such injury, but that the employer had actual knowledge of the injury and that the employer has not been prejudiced by failure of claimant to give notice;

“That the employer did not furnish claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act, or at all. That the employer assisted claimant in getting admission to the United States Marine Hospital as a seaman for the treatment of his condition;

“That the average annual earnings of the claimant herein at the time of his injury amounted to the sum of \$15.00.00;

“That claimant continued in his employment with distress and under medical care until August 5, 1938, when he entered said United States Marine Hospital. His wages were paid to and including August 4, 1938. He was discharged from said hospital on December 22, 1941, and was continuously disabled from labor until said date. During said time he was ill from heart trouble and active arthritis of the lower back, right knee, right foot and left foot. The arthritis of his lumbar spine was exacerbated by his injury and was an important portion of his illness. The other conditions mentioned above were not the result of, or exacerbated by, said injury. Compensation due for said period, 176 $\frac{3}{8}$ weeks at \$19.22 a week, is \$4410.71, no part of which has been paid;”

On August 22, 1941, the deputy commissioner filed a previous compensation order in this case in which he rejected the claim for compensation upon the ground that claimant's employment was not maritime and that his injury did not come within the purview of the Longshoremen's Act. Claimant thereafter brought a proceeding for review of said order of rejection. The United States District Court for the Southern District of California, Central Division, set aside the order of rejection and the United States Circuit Court of Appeals, Ninth Circuit, affirmed the action of the district court and remanded the case to the deputy commissioner for

further action in conformity with the opinion. Several hearings were subsequently held by the deputy commissioner on September 10, 1943, and September 27, 1943, and upon the evidence adduced at said hearings, as well as upon the [27] evidence heard at the previous hearings, the deputy commissioner filed the compensation order of January 11, 1944, complained of.

Plaintiffs' complaint states four reasons (paragraph 8) why the compensation order allegedly is not in accordance with law. The reasons as alleged are in substance: (a) that there is no evidence for the finding that the injury occurred in February, 1938, (b) that the deputy commissioner failed to find that the claim was barred by the statute of limitations (the complaint refers to subdivision (a) of section 919 of 33 U.S.C.—this apparently is in error, as section 919 does not relate to the time limit for filing claims; reference was probably intended to section 913(a), which provides for the period within which a claim may be filed), (c) that section 930(f) (which was enacted June 25, 1938) of 33 U.S.C. is inapplicable to extend the period for filing the compensation claim in this case, and (d) that there is no evidence to support the finding that claimant is entitled to compensation for 176-3/7 weeks at \$19.22 per week, or a total of \$4410.71, or to any other sum.

Before proceeding to indicate the evidence which, in our opinion, supports the findings complained of ((a) and (d), *supra*), it may not be inappropriate

to invite the court's attention to the following well-established principles of compensation law:

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelphia Steamboat Co. v. Norton*, deputy commissioner, 284 U.S. 408 (1932); *Fidelity Casualty Co. of New York v. Burris*, 61 App.D.C. 228, 59 F.(2d) 1042 (1932); *Associated General Contractors of America, Inc. et al. v. Cardillo*, deputy commissioner, 70 App. D.C. 303, 106 F.(2d) 327 (1939); *De Wald v. Baltimore & O. R. Co.*, 71 F.(2d) 819 (C.C.A. 4, 1934), certiorari denied October 8, 1934, 293 U.S. 581.

In the absence of substantial evidence to the contrary the presumption is "That the claim comes within the provisions of this Act": Section 20(a) of the Longshoremen's Act.

The burden is on the plaintiff to show that there was no [28] evidence before the deputy commissioner to support the compensation order complained of in the bill; *Grant v. Marshall*, deputy commissioner, 56 F.(2d) 654 (D.C. Wash. 1931); *United Employees Casualty Co. v. Summerous*, 151 S.W.(2d) 247 (Tex. 1941); *Nelson v. Marshall*, deputy commissioner, 56 F.(2d) 654 (D.C. Wash. 1931); *Gulf Oil Corporation v. McManigal*, deputy commissioner, 49 F.Supp. 75 (D.C. N.D. W.Va. 1943).

The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review: *South Chicago Coal & Dock Co., et al. v. Bassett*,

deputy commissioner, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U.S. 162 (1933); *Crowell, deputy commissioner v. Benson*, 285 U.S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner*, 286 U.S. 528 (1932), 71 C.J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Liberty Mutual Ins. Co. v. Gray, deputy commissioner*, 137 F.(2d) 926 C.C.A. 9, 1943; *Michigan Transit Corporation v. Brown, deputy commissioner*, 56 F.(2d) 200 (D.C. Mich. 1929); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner, et al.*, 21 F.Supp. 535 (D.C. Me. 1937); *Grain Handling Co. Inc. v. McManigal, deputy commissioner*, 23 F.Supp. 748 (D.C. N.Y. 1938); *Simmons v. Marshall, deputy commissioner*, 94 F.(2d) 850 (C.C.A. 9, 1938); *Lowe, deputy commissioner v. Central R. Co. of New Jersey*, 113 F.(2d) 413 (C.C.A. 3, 1940); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

The deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence: [29] *Liberty Stevedoring Co., Inc. v. Cardillo, deputy*

commissioner, 18 F.Supp. 729 (D.C. N.Y. 1937); *Joyce v. United States Deputy Commissioner*, 33 F.(2d) 218 (D.C. Me. 1929); *Jarka Corporation of Philadelphia v. Norton*, deputy commissioner, 56 F.(2d) 287 (D.C. Penn. 1930); *E. S. Booth v. Monahan*, deputy commissioner, 56 F.(2d) 168 (D.C. Me. 1930); *Zurich General Accident & Liability Insurance Co. v. Marshall*, deputy commissioner, 42 F. (2d) 1010 (D.C. Wash. 1930); *Baltimore & Ohio R.R. Co. v. Clark*, deputy commissioner, 56 F.(2d) 212 (D.C. Md. 1932); *Ryan Stevedoring Co., Inc. et al. v. Norton*, deputy commissioner, et al., 50 F. Supp. 221 (D.C. E.D. Pa. 1943).

Notwithstanding sharp conflict in the evidence on question of disability, the injured employee's testimony alone is sufficient to sustain an award in his favor: *Independent Pier Co. v. Norton*, deputy commissioner, 54 F.(2d) 734 (C.C.A. 3, 1931).

The rights, remedies and procedure under the Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the court are those only which are expressly conferred by the said Act: *Associated Indemnity Corp. v. Marshall*, deputy commissioner, 71 F.(2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage*, deputy commissioner, 67 App.D.C. 52, 89 F.(2d) 796 (1937); *Luyk v. Hertel*, 242 Mich. 445, 219 N.W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton*, 9 S.W.(2d) 65 (Texas 1928); *Nierman v. Industrial Comm.*, 329 Ill. 623, 161 N.E. 115 (1928); *Town of Albion v. Industrial Commission*, 202 Wis. 15, 231 N.W. 249 (1930). Compare also: *Bassett*, deputy commis-

sioner v. Massman Construction Company, 120 F. (2d) 230 (C.C.A. 8, 1941), cert. den. 62 S.Ct. 92.

The following is a reference to so much of the testimony taken before the deputy commissioner as is considered sufficient to show that the findings of fact in the compensation order complained of are supported by evidence. This narration is not intended to cover all of the testimony as, under the authorities, it is necessary only to show that there is evidence to support the findings of fact of the deputy commissioner. [30]

Albert V. Steffen, claimant, testified on February 5, 1941, that he was a watchman taking care of the SS Prentiss and had been working at that job since 1931 (T. 8, 9); that the vessel was undergoing repairs and structural changes at the time of the accident (T. 12); that as he was coming off the ship down a ladder, which extended from the bow to a sort of pontoon, the ladder let go, struck his knee and he landed on his back (T. 12); that at the time he was going down the ladder to answer a call from Mr. Cordes, his superior, and that the distance he fell was about 8 or 10 feet (T. 13); that he immediately told Mr. Cordes that he had a fall and the latter told him he would be all right; that he drove his superior in an automobile, but because of the flood conditions they were unable to continue; that his back pained him; that he again informed his superior of the accident and spent the next three days with his superior in Los Angeles, during which he had his back attended to by a physician (T. 14,

15); that his back got so bad he was unable to stay on the ship any more due to the dampness and to the stiffness and aching of his back and that he told Mr. Cordes that something had to be done about his back (T. 15); that Mr. Cordes sent him to the U. S. Public Health Service at San Pedro (T. 15, 16); and from there he was sent to the U. S. Marine Hospital at San Francisco; that his superior, Mr. Cordes, came to visit him at the hospital (T. 16); that his wages at the time of the injury were \$125 a month, about \$63 every two weeks (T. 18).

Claimant testified on April 17, 1941, that he told his superior that he had an accident on the ship (T. 2); that the latter went with him to the U. S. Public Health Service (T. 3); that the accident took place in March or the latter part of February, 1938; that it was at the time of the washing out of the bridge and of the big rain in 1938 (T. 4); that the first time he went to a physician was in February, 1938, and the physician to whom he went was one suggested by the lady who owned the penthouse where the claimant and his superior, Mr. Cordes, stayed on the trip to Los [31] Angeles immediately after the injury (T. 14, 15); that he was also treated by a chiropractor (T. 15), an M.D. (T. 16), and that Mr. Cordes also wanted him to go to an osteopath whom he recommended (T. 18).

Claimant testified at the hearing of September 10, 1943, that he was discharged from the U. S. Marine Hospital on December 22, 1941 (T. 3).

Fred H. Cordes, claimant's superior, testified on March 18, 1941, that claimant's wage was \$125 a month (T. 10).

Dr. Robert A. Bilafer testified at the hearing of April 17, 1941, that he is a physician and surgeon and a member of the staff of the U. S. Marine Hospital; that claimant was admitted to the hospital on August 5, 1948 (1938) (T. 5); that the chief complaint was arthritis and that claimant stated that 7 months ago he fell from his ship, striking his back on a pontoon (T. 6); that claimant could well have had an aggravation of a pre-existing arthritis of the spine, right knee and ankle, and that in his opinion it has given claimant considerable trouble since the date of the injury because of such aggravation (T. 7); that the back pain which claimant complains of could well have been caused by the aggravation (T. 8); that claimant was totally disabled for heavy physical work at the time of the hearing (T. 10).

It will be seen from the foregoing reference that the deputy commissioner's finding of fact, complained of, to the effect that claimant sustained an injury to his back in February, 1938, and that he was disabled as a result thereof from August 5, 1938, the date of his admission to the U. S. Marine Hospital, until at least his discharge therefrom on December 22, 1941, a period of 176-3/7 weeks, and that his wage rate was \$125 a month, or \$1500 a year, are supported by evidence and, under the authorities cited above, should be regarded as final and conclusive. Section 8(b) of the Act (33 U.S.C.A. sec. 908(b) provides, in effect, that in case of total disability compensation shall be paid on a basis of 66 $\frac{2}{3}$ per cent [32] of the average weekly wages

during the continuance thereof. As claimant's annual wage was \$1500, his average weekly wage, computed as provided in section 10(d) (33 U.S.C.A. sec. 910(d)), was $1/52$ part of said average annual earnings, or \$19.22 per week, which, when multiplied by $176-3/7$ weeks, amounts to \$3390.95. The computation of the deputy commissioner in this respect was in error and the amount of the award should have been as just stated instead of \$4410.71 as awarded. There is no allegation in the bill that the deputy commissioner erred in applying section 10 of the compensation law (the section setting forth the formulae for determining average weekly wage), and the complaint is therefore construed as calling attention to the error in mathematical computation of compensation.

The Compensation Claim was Timely Filed

As stated above, it is alleged in paragraph 8 of the complaint, in effect, that (b) the deputy commissioner failed to find that the claim was barred by the statute of limitations, and (c) that section 930(f) of 33 U.S.C. is inapplicable to extend the period for filing the compensation claim in this case.

Section 13(a) of the Act (33 U.S.C.A. sec. 913(a)) provides, in effect, that claim for compensation shall be filed within one year after the injury. The term "injury", as used in this section, has been construed to mean "compensable injury",—NOT THE DATE OF THE ACCIDENT, but the time from which the employee had a basis under the statute upon which to claim compensation, such basis being

only the EXISTENCE OF DISABILITY FOR WORK RESULTING IN A LOSS OF WAGES. *DiGiorgio Fruit Corp., et al. v. Norton*, deputy commissioner, et al., 93 F.(2d) 119 (C.C.A. 3, 1937), cert. den. 302 U.S. 767; *Potomac Electric Power Co. v. Cardillo*, deputy commissioner, 107 F.(2d) 962 (App. D.C. 1939); *Kropp v. Parker*, deputy commissioner, et al., 8 F. Supp. 290 (D.C.Md. 1934). Therefore, within the application of section 13(a) as interpreted by the decisions above cited, all under the Longshoremen's Act, the claim in the present case was [33] timely filed.

Claimant was not disabled for work until August, 1938, when he entered the Marine Hospital, so that if section 13(a), supra, WERE THE ONLY section applicable in this case with respect to the time for filing claim, it would have been necessary for claimant to file his claim not later than August, 1939. Section 13(a), however, is not the only section which is applicable. Section 30(f) of the Act (33 U.S.C.A. sec. 930(f)) provides that where the employer has knowledge of an injury of an employee and fails, neglects or refuses to file a report thereof in the manner and as required by the provisions of subdivision (a) of section 30 of the Act, the limitations of section 13(a) shall not begin to run against the claim or in favor of either the employer or the carrier until such EMPLOYER'S REPORT shall have been filed. The evidence shows that the employer knew of the injury and it is uncontradicted that no such required report was ever filed with the deputy commissioner. The employer and car-

rier apparently do not contend that they gave notice to the deputy commissioner, but they maintain that because section 30(f) was added to the Act on June 25, 1938, which was subsequent to the date of the accident, it did not have the effect of extending claimant's time for filing claim for compensation resulting from the disability which began on August 5, 1938.

Section 30(f) in effect tolls the limitations of section 13(a) until such time as the report of injury which the statute requires has been filed by the employer or carrier with the deputy commissioner. It is well recognized that a statute of limitations is remedial or procedural legislation and that the period in which to file a claim may be extended by amendment to the law where the right to file a claim had not expired prior to the amendment. *Orton v. Olds Motor Works*, 240 N.Y.S. 570, 229 App.Div. 46 (1930); *Wentz v. Price Candy Company*, 168 S.W.(2d) 462 (Mo. App. 1943); *Seneca v. Yale and Towne Manufacturing Company*, 16 Atl.(2d) 754, 142 Pa.Super. 470 (1941); *Matkosky v. Midvale Company*, 18 Atl.(2d) [34] 102, 143 Pa.Super. 197 (1941). In the *Orton* case, *supra*, the injury occurred on February 14, 1928. At that time the law provided that the right to claim compensation should be barred unless within one year after the accident a claim for compensation was filed with the Commission. The law was amended, effective July 1, 1928, permitting the filing of a claim for compensation after the expiration of one year from the date

of accident, but not exceeding two years, where the Commisison shall find that such filing shall be in the interest of justice. Claimant filed his claim on March 6, 1929, which the Commission accepted. Upon a review of the compensation award the court said that it saw "no reason why the amendment should not apply to claims accrued **BUT NOT EXTINGUISHED**. This claim had not been extinguished at the time the amendment went into effect. The year for filing a claim did not expire until the following February. The amendment became part of the provision of the statute dealing with rules of limitation in the prosecution of a claim affecting the remedy only and not the substantive right to compensation. The period of limitation, though it had begun to run, could be extended by the board."

There have been no decisions under the Longshoremen's Act holding whether or not section 30(f), extending the period for filing claims, applies to claims for injuries which had accrued but which had not expired at the time of the effective date of the amendment. In two cases, however, involving an amendment to section 22 of the Act, the courts have held that the amendment was retroactive. In the case of *New Amsterdam Casualty Company v. Cardillo*, deputy commissioner, 108 F.(2d) 492 (App.D.C.), the court said:

"We think Congress had the power **TO EXTEND** or to contract the **PERIOD OF LIMITATION** as applicable to an indemnity claim **EITHER PENDING** or subsequently brought."
(Emphasis supplied)

See to the same effect, Bethlehem Shipbuilding Corporation v. Cardillo, deputy commissioner, 102 F.(2d) 299 (C.C.A. 3, 1939). [35]

The case of Paramino Lumber Co. v. Marshall, deputy commissioner, 309 U.S. 370, which originated in the ninth U. S. Circuit, involved a private Act of Congress which directed the deputy commissioner to review a compensation order filed under the Longshoremen's Act although the right to do so under the latter Act HAD EXPIRED five years previously. In the court below, 27 F.Supp. 823, and before the Supreme Court, the employer and carrier had strenuously urged that "the lapse of the time limit on such statutory causes of action not only bars the remedy but destroys the liability as well." (See argument for appellants on page 373 of 309 U.S. and dissenting opinion in the court below, 27 F.Supp. 823, 826). The Supreme Court stated in this respect:

"The argument of appellants is that the original award was an adjudication on which further review was barred prior to the enactment of the private act; that thereby rights and obligations were finally determined, the deprivation of which took from appellants a substantive immunity from further claims of Clark and created in Clark new substantive rights.

"* * * But we do not agree that the immunity obtained by the lapse of the time for review is the type of immunity which protects

its beneficiary from retroactive legislation authorizing review of the claim. This private act does not set aside a judgment, create a new right of action or direct the entry of an award. The hearing provided for is subject to the provisions of the general act for longshoremen's and harbor workers' compensation. It does not operate to create new obligations where none existed before. * * *

"It is unimportant whether the claim persisted after the bar or ended with the running of limitation. To cure a fault of administration Congress may validly enact this act."

If, then, a barred right may be RESTORED by a private relief measure (barred after lapse of time), it would seem clear a fortiori that a time limit may be extended by a general amendment to the law and such extension apply in cases in which the bar of limitations has not as yet operated. This case should be regarded as controlling in principle.

It would appear, therefore, in the instant case, that claimant, who was injured in February, 1938, and whose disability began in August, 1938, came within the protection of section 30(f) [36] which became law on June 25, 1938, which was long before the expiration date for filing claim under the law as it stood prior to its amendment.

CONCLUSION

In view of the above it is respectfully submitted that the findings of the deputy commissioner, com-

plained of, with reference to the date of injury, the nature and extent of claimant's disability resulting therefrom, the average weekly wage, and the weekly rate of compensation, are all supported by evidence and are, therefore, final and conclusive. In view of the error in computation as to the total amount of compensation due, it is respectfully urged that the case be remanded to the deputy commissioner to compute correctly the total amount of compensation due, after having rendered judgment finding that the compensation order in all other respects is in accordance with law, with dismissal of the complaint as to all other matters.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant United States

Attorney

Attorneys for Defendant
Pillsbury

WARD E. BOOTE

Chief Counsel,

U. S. Employee's Compensation Commission

HERBERT P. MILLER

Associate Counsel,

Of Counsel.

Received copy of the within Memorandum this
15th day of March, 1944.

A. A. GOLDSTONE

Attorney for Albert V. Steffen

[Endorsed]: Filed March 15, 1944. [37]

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION
FOR JUDGMENT

Point I

The Answer of the Respondent, Warren H. Pillsbury, deputy Commissioner, United States Employees' Compensation Commission, and the Answer of the Respondent, Albert V. Steffen, both admit that there has been an error in the computation, so that it is admitted by the pleadings that in no event should the Award be for more than $176\frac{3}{8}$ weeks at \$19.22 a week, which according to my figures is the sum of \$3389.92.

It being admitted that there was an error in the computation, the Motion to Dismiss should not be granted, and a decree should enter herein, fixing the Award in the correct amount. [38]

Point II.

It will have to be conceded that under the law that if the deputy commissioner's findings are supported by evidence they should be affirmed, so that the real point in issue here other than on the amount, as above set out, is whether or not the Respondent, Albert V. Steffen, had a cause of action against the Complainants herein, as he did not file his claim with the commissioner within the period of one year from February, 1938, the date found by the commissioner to be the date of injury, as

provided by Section 13(a) of the Act (33 U.S.C. 913(a)).

Facts:

A. It is undisputed that the accident causing the injury to the Respondent, Albert V. Steffen, occurred in February, 1938, and this fact was so found by the commission, supported by substantial evidence.

B. It is undisputed that the Respondent, Albert V. Steffen, did not file a claim with the commissioner until on or about January 20, 1941, and that thereafter at the first hearing the defendants raised the issue that the claim was barred by virtue of Section 13 of the Act.

C. It is undisputed that in February of 1938 Section 13(a) of the Act provided in effect that a claim should be barred unless filed within one year after the injury.

D. It is undisputed that Subdivision (f) of Section 30 of the Act, providing that Section 13(a) should not begin to run until a report was filed with the commissioner, did not become effective until June 25, 1938.

The issue then is: Did the amendment of Section 30 of the Act by adding thereto Subdivision (f) on June 25, 1938 extend the time within which the Respondent, Albert V. Steffen, could properly file his claim with the commissioner under the provisions of Section 13(a) of the Act? [39]

The Respondents have attempted to avoid the provisions of Section 13(a) of the Act as it existed in

February of 1938 by claiming that the injury received by Albert V. Steffens did not become a compensable injury until August of 1938, and that, therefore, the provision of Subdivision (f) of Section 30 of the Act would be applicable at the time of injury.

In support of this contention the Respondents have cited *DiGiorgio Fruit Corp., et al. vs. Norton*, 93 F.(2d) 119; *Potomac Electric Power Co. vs. Cardillo*, 107 F.(2d) 962 and *Kropp vs. Parker*, 8 F.Supp. 290.

In answer to this contention and to the cases cited by Respondents, we wish to call the attention of the Court to the fact that Steffens' injury was clearly patent, and he gave immediate notice to his employer of the injury, and such being the case the date of accident and the date of injury are one and the same.

Liberty Mutual Ins. vs. Parker, 19 F.Supp. 686—Chestnut, District Judge.

"This is a suit to set aside a Compensation Award by the deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act. There is no controversy as to the facts, the contention being only that the Award is not in accordance with law because the employee's claim was not filed "within one year after the injury", as required by Section 13(a) (33 U.S.C.A. 913(a)).

Briefly condensed, the facts as found by the Deputy Commissioner were as follows: The employee had been employed around the Baltimore

Harbor as a longshoreman for about thirty-five years and at the time of his accident and injury in the particular case, had been employed as a hatch boss for several years prior thereto by the employer the Baltimore Stevedoring Company, of which the Liberty Mutual Insurance Company was the insurer. During the first week in December, 1934, the employee, in the course of his usual work, slipped on a ship's deck and fell against the mast [40] catching his weight on his right thumb. He mentioned it to his foreman but no visible injury was apparent and the employee continued his work during the remainder of the day; but shortly thereafter his hand grew somewhat stiff and that evening a small knot appeared on the back of his hand which subsequently proved to be a ganglion resulting from the strain. It gradually grew larger until about a month thereafter the employee showed his hand to his personal physician who told him "it will have to be cut out"; and some months later he visited the Johns Hopkins Hospital where he was told that if his hand did not hurt or bother him he need do nothing about it. He made no complaint to the employer until February, 1936, when he found that the fingers of his right hand were being somewhat affected, and then applied to the office of his employer for medical treatment. He continued to work until May 5, 1936, when, at the employer's expense a surgical operation was performed which removed the ganglion, then about the size of a guinea egg, and he returned to work on May 25, 1936.

The employer made no report of the accident to the Deputy Commissioner until February 17, 1936; and the claimant filed no claim with the Deputy Commissioner until April 8, 1936, more than a year after the date of the accident. The claimant was not actually disabled from the accident (in the sense of loss of time from work) until May 5, 1936. The Deputy Commissioner found that the employer had not been prejudiced by failure to receive written notice of the accident because its foreman had been verbally notified at the time.

At the hearing of the claim the insured by its counsel, placed its objection to any award on the ground of lack of written notice within thirty days and failure to file claim within a year after the injury. But the former objection is not pressed, not being made in the plaintiff's bill of complaint here. The insurer does, however, earnestly press the second objection as an important [41] question of law despite the small amount of the award of only \$34.35. It was stated by counsel at the hearing that although the amount of the award has actually been paid the suit was not moot because the insurer would have a right of recovery although it was intimated that the point was being insisted on in this case for decision as a precedent rather than as a basis for recovery.

The Deputy Commissioner based his legal conclusion in favor of the claimant on the case of *Kropp v. Parker*, Deputy Commissioner, 8 F.Supp. 290, decided in this court September 29, 1934. It

was there held that the term "injury" as used in section 913 was not necessarily synonymous with the word "accident" but should be construed in the sense of "compensable injury." So construed it was held that a claim for a latent injury was within time although not filed until more than one year after the accident where the injury, which finally resulted in a brain tumor, as found by the Deputy Commissioner, was not diagnosed until very shortly before the claim was filed and where the employee had not previously been disabled from work. There has apparently been no other federal decision on the precise point either prior or subsequent to the Kropp Case although I note that it was cited with apparent approval by Judge Adkins of the United States District Court for the District of Columbia in *Commercial Casualty Insurance Company v. Hoage*, Deputy Commissioner, 2 S.D.C.Reports, 26, 28. As stated in the opinion in the Kropp Case, the construction applied to the statute was in accordance with the majority of state court decisions on similarly worded workmen's compensation statutes. It is not intended in this case to depart in any way from the decision there made.

But the facts in this case are, in my opinion, clearly distinguishable from the Kropp Case in the important point that the injury sustained by the employee in this case became patent and fully observable almost immediately after the accident and more [42] than a year before the claim was filed. The swelling on the back of the claimant's hand be-

came apparent on the very evening of the accident and had increased to such a size within a month that he was definitely advised by his physician that it would have to be cut out. From his testimony at the hearing it is quite apparent that he was reluctant to have the operation and that he endeavored to abate the swelling by personal treatment in the use of hot water and other applications. As his work was not directly interfered with by the ganglion on the back of the hand and as he had no pain therefrom, he apparently preferred to go on working, rather than undergo the personal discomfort of a surgical operation which, however, he had been told would be necessary. Therefore we have a case where the injury sustained was practically contemporaneous with the accident and where the injury was clearly patent and not latent.

Nor is there any difficulty in distinguishing this case factually from the Kropp Case, when injury is construed as meaning "compensable injury." The claimant was advised within a month after the accident that he would need a surgical operation and by section 7, as amended (33 U.S.C.A. §907) he was entitled to receive this at the expense of the employer; such surgical treatment being classed by section 6 (33 U.S.C.A. §906) as a part of the compensation to which the employee is entitled.

I therefore conclude that the award in this case must be set aside as not in accordance with law, because the employee's claim was not filed within a year after the injury occurred.

Counsel may submit the appropriate order in due course.”

The contention of these Respondents on this point and the case as cited by them is further answered by the following case:

Kobilkin vs. Pillsbury, 103 Fed.(2d) 667—
Circuit Court of Appeals, Ninth Circuit;
April 14, 1939. [43]

Certiorari granted (affirmed) rehearing denied.

Opinion by Healy, Circuit Judge.

“Appellant filed a claim for compensation under the Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C.A. §901 et seq. Upon denial of his claim he brought suit by petition in equity to set aside the order of the deputy commissioner, invoking §21(b) of the act. The appeal is from a decree granting a motion to dismiss, addressed to the petition.

Appellant, as the pleading discloses, was employed by the Matson Navigation Company as a longshoreman. On June 7, 1935, during the unloading of a vessel a bag of sugar which was being raised from the hold dropped off a sling load and struck appellant on his left shouldder. It was found that he had sustained a bad bruise and in consequence he was wholly disabled for three weeks following the accident, during which time compensation was voluntarily paid him. Thereafter, although working with some physical impairment, he suffered no loss of wages on account of the injury until January 9, 1937. On the latter date he had a severe pain in his

shoulder, went to a physician of his own choice for treatment, and was later removed to a hospital, where he was operated upon on January 27, 1937 for excision of the subtoid bursa of the shoulder. At that time a separation of the bones of the shoulder at the acromio-clavicular articulation was noted. On March 3, 1937 appellant filed his claim.

The deputy commissioner denied the claim on the ground that it had not been filed within one year from the date of the last payment of compensation and was therefore barred. The question here is whether the ruling was proper. §13(a) of the act provides, 'the right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury * * * except that if payment of compensation has been made without an award on account of such injury * * * a claim may be [44] filed within one year after the date of the last payment.' 33 U.S.C.A. §913(a). §22, so far as material, provides that 'upon his own initiative, or upon the application of any part in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919.' 33 U.S.C.A. §922.

Appellant makes the contention, probably war-

ranted by the record, that the acromio-clavicular dislocation had originally been overlooked and was not recognized until the performance of the operation for the removal of the bursa in January, 1937. The point involved is a novel one under the federal act, has been earnestly presented, and we have given it careful consideration. The argument is that the external injury or bruise was immediately recognized and compensated, but that the dislocation was not recognized until January, 1937, when it became disabling. The external and internal injuries, it is said, must be considered in effect as separate injuries; and since the latter was not discovered or discoverable until more than one year after the last payment of compensation for the former, the limitation does not commence to run until the existence of the injury can reasonably be ascertained.

Such is claimed to be the rule in respect of latent injuries under the state laws; and a number of cases, collected on the margin, are cited in support of the contention. Turning as they necessarily do on the wording of specific statutes, these cases are of little aid in the present inquiry. With the notable exception of the Nebraska authorities, we are unable to agree that they support appellant's views. An opinion of the District Court of Maryland in [45] *Kropp vs. Parker*, 8 F.Supp. 290, involving the Longshoremen's Act, leans in appellant's direction, but compare the later opinion of that court in *Liberty Mutual Ins. Co. v. Parker*, D.C., 19 F.Supp. 686. Needless to say, cases like *Marsh v. Industrial*

Accident Commission, *supra*, note, and *Hoage v. Employers Liability Assurance Co.*, 62 App.D.C. 77, 64 F.2d 715, which deal with occupational diseases, are not to be accepted as authority in a situation like the present. Possibly the decision of the Third Circuit Court of Appeals in *DiGiorgio Fruit Corp. v. Norton*, 93 F.2d 119, may be classified among cases of the latter type. But if the condition there dealt with was purely an accidental injury, and not an occupational disease or infection, we are not able to understand the court's implied conclusion that it arose 'in the course of employment'.

Decisions arising under statutory provisions analogous to those of the federal act generally hold that the date of injury, and not the subsequent date when incapacity develops, is the one from which the time limitation must be reckoned. *O'Esau v. E. W. Bliss Co.*, 188 App.Div. 385, 177 N.Y.S. 203; *Williams v. Safety Casualty Co.*, 129 Tex. 184, 102 S.W.2d 178; *Travelers Ins. Co. v. Burden*, 5 Cir., 94 F.2d 880, 883; *Cooke v. Holland Furnace Co.*, 200 Mich. 192, 166 N.W. 1013, L.R.A. 1918E, 552; *Sandahl v. Department of Labor and Industries*, 170 Wash. 380, 16 P.2d 623; *Ehrhart v. Industrial Accident Commission*, 172 Cal. 621, 627, 158 P. 193, 195, Ann.Cas. 1917E, 465; *McLaughlin v. Western Union Telegraph Co.*, 5 Cir., 17 F.2d 574; *Silva v. Wheeler & Williams, Ltd.*, 32 Hawaii 920.

(1, 2) The terms 'injury' and 'disability', separately defined in the statute, are not synonymous. It has not been suggested that the injury from which

appellant suffers is an occupational disease. Admittedly, it is an accidental injury arising in the course of employment. It was inflicted at the time of the accident, [46] not when its full extent was first noted at the later time. The trauma in fact resulted in an immediate though temporary disability for which appellant was paid compensation. The circumstance that appellant again became disabled a year and a half later, and the more serious nature of the injury was then for the first time recognized, does not change the situation. The claim was not filed until more than a year after the occurrence of the injury and more than a year after the last payment of compensation. Under the plain terms of §13(a) of the statute the claim is barred. If we turn to §22 and assume a change of condition we again encounter the statutory bar.

(3-5) It was the manifest Congressional intent to deny compensation in all cases of disability arising from accidental injury unless claim is filed within the time limited. No provision is made for exceptional cases. We agree that the act is to be liberally construed, but neither the deputy commissioner nor the courts have the power to legislate; and nothing short of legislation would make relief possible in a case like this.

(6, 7) Appellant should have filed his petition as a libel on the admiralty side of the district court. See *Twin Harbor Stevedoring & Tug Co. et al. v. Marshall et al.*, 9 Cir., 103 F.2d 513, this day decided. The cause is remanded to that court with

instructions to treat the petition as a libel, the motion to dismiss as an exception to its sufficiency (Admiralty Rule Sup. Ct. 27, 28 U.S.C.A. following section 723), and to enter a decree of dismissal.

The decree is vacated with instructions to transfer to admiralty docket and decree a dismissal."

It can be seen from the above citations that the terms "injury" and "disability" under the Federal statutes are not synonymous, and that under the statute the injury in the matter before us occurred in February, 1938, as found by the referee in his Award. [47]

In this matter the commissioner found on substantial evidence that the injury occurred in February, 1938, and under the law as it existed at that time the year within which the respondent, Steffen, could perfect his claim by filing with the commissioner started to run in February of 1938 and expired in February of 1939, and upon the expiration of this period in February of 1939 the respondent, Albert V. Steffen, no longer had a claim, as the filing of the claim within the year is jurisdictional.

Does Subdivision (f) of Section 30 of the Act Have Retroactive Affect?

In this regard it must be remembered that Section 13(a), the limiting statute, was not amended or extended. The only action taken by Congress, effective June 25, 1938, was the addition of Subdivision (f) to Section 30 designating certain conditions under which Section 13(a) should not be operative.

The respondents have recited the following cases in support of their contention that Subdivision (f) of Section 30 should be given retroactive effect, these cases referring to Section 22 of the Act.

In the case of *New Amsterdam Casualty Company vs. Cardillo*, 108 F.(2d) 492, the Court held that the amendment to Section 22 was operative and further held that the language of the section indicated the intention of Congress to make it retroactive.

Page 493. "The language of the amendment definitely indicates the intention of Congress to make it both retroactive and prospective, for the words are . . ."

In other words, in the *New Amsterdam* case the Court in conformity with the well established principle of law held that the statute clearly indicated that it was the intention that the statute should be retroactive, which is not true insofar as Subdivision (f) of Section 30 is concerned. [48]

Bethlehem Shipbuilding Corporation vs. Cardillo, 102 F.(2d) 299, cited by Respondents. As I interpret this case, it does not hold Section 22 of the Act to be retroactive, for at page 303 we find the following:

"In other words the new Award made under Section 22 WAS NOT a retroactive application of Section 22, but a prospective one and in accordance with the law existing at the time it was made."

The third case cited by respondents on this point, *Paramino Lumber Co. vs. Marshall*, 309 U.S. 370, Court below 27 F.Supp. 823, I do not believe is in point for the reason that this case turned entirely on the question of the constitutionality of a private statute. In the *Paramino* case Congress passed a special Act directing the commissioner to give *Marshall* certain benefits. It did not in this Act change any of the sections of the law, and in the interpretation and holding in favor of *Marshall* the Court held that the private statute was merely curative. "It is an Act to cure a defect in administration developed in the handling of a compensable claim."

Statutes will be interpreted prospectively unless the language of the statute admits of no other construction.

In re *Cederbaum*, 27 Fed.Supp. 1014;

In re *Gasterger & Co.*, 25 F.(2d) 642;

Colgate vs. Palmolive Pub. Co. vs. U. S., 37 Fed.Supp. 794 at page 797.

"Every statute operates on future Acts unless a contrary intent is expressly declared. The [49] Supreme Court has so stated in an unbroken line of cases from the earliest day to the present . . . a law is presumed in the absence of clear expression to the contrary to operate prospectively." Citing *Hassett vs. Welch*, 303 U.S. 303.

A statute is presumed to operate prospectively only.

In re Ritz-Carlton Restaurant and Hotel Co.,
24 Fed.Supp. 78;

Com. Internal Revenue vs. Marshall, 91 F.
(2d) 1010;

Sovereign vs. Casados, 21 Fed.Supp. 989.

California cases that a statute shall be interpreted prospectively only unless there is a clear intention to the contrary:

Montecito County Water District vs. Doulton,
193 Cal. 398;

Krause vs. Rarity, 210 Cal. 644.

Point III.

The filing of his claim with the deputy commissioner within one year from February, 1938, as provided by Section 13(a) of the Act was jurisdictional, and the failure of Steffen to file the claim within such time deprived the commissioner of jurisdiction to hear this matter.

Slade vs. Branham, 48 Fed.Supp. 769, November, 1942.

The filing of a claim within one year is jurisdictional.

Section 13 of the Act (33 U.S.C.A. 913);

Dawson vs. Jahneke, 33 Fed.Supp. 668, June
1940 at page 670. [50]

Compliance with the statute as to the time of filing is jurisdictional.

The Longshoremen's Act created in favor of the injured employee a right which he did not have before, a right unknown to the common law, and in order to assert such right the employee must bring his action or file his claim within the time specified in the Act.

Young vs. Hoage, 90 Fed.(2d) 395 at page 400.

“ . . . the rule is established that, where a statute gives a right of the character in question, a right unknown to the common law, and limits the time within which an action shall be brought to assert it, the limitation defines and controls the right.

In that view the objection made here is jurisdictional, and here there are no equities which we can properly consider.”

Callahan vs. Chesapeake & O. Ry. Co., 40 Fed.Supp. 353, September 6, 1941; Swinford, District Judge.

“The case is before me on the defendant's motion to dismiss the complaint. The action is brought under and pursuant the provisions of the Federal Employer's Liability Act, Title 45 U.S.C.A. Sections 51 to 59 inclusive.

The alleged injury occurred on October 8, 1937. At that time the Act in question provided: ‘No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.’ Section 56.

On August 11, 1939, an amendment to the Act became effective which provided: 'No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.' [51]

This action was commenced October 5, 1940. It will thus be seen that the statute was changed from two years' limitation to three years' limitation before the two years had expired and that plaintiff commenced his action after the two years had expired but within three years from the time the action accrued.

(1) This question of limitation embodied in the Act giving the remedy is a jurisdictional fact which must appear from the face of the complaint.

(2, 3) The plaintiff's remedy arose under the Act that was in effect at the time the alleged injury occurred and not the Act of August 11, 1939. That became the law after the right to seek the remedy which he seeks here had accrued. Had there been no Employer's Liability Act he would have had no cause of action based on the allegations of his complaint. Since he adopts a remedy prescribed by this particular statutory enactment he is bound to assert the prescribed conditions in their entirety. The Act with its accompanying conditions, which was in existence at the time of the accident, not some later Act with different conditions. The limitation provisions of the Act are an integral part of the remedy which he seeks to assert and must be alleged and proved. Any other construction would present an

intolerable condition which would substitute judicial legislation for the constitutional authority of the legislative body through which and only through which this plaintiff ever had the particular remedy. One relying for redress upon a statute must bring the facts alleged within the statutory conditions.

The rule is stated in the syllabus from *Morrison v. Baltimore & Ohio Railroad Company*, 40 App. D.C. 391, Ann. Cas. 1914C, page 1026, as follows: 'Under the Federal Employers' Liability Act of June 11, 1906 (Fed.St.Ann. 1909 Supp. p. 585) the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been [52] made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of the right.'

(4) This is not a case in which a general statute of limitation is relied upon. In such case the statute must be plead. But it is a case in which the statutory remedy provides as a condition precedent that the action thereon must be commenced within a prescribed time. Such fact is jurisdictional and may be raised by motion to dismiss. *Bell v. Wabash Ry. Co.*, 8 Cir., 58 F.2d 569.

(5) It is a well recognized rule of statutory construction that a law will not be considered retroactive unless such legislative intent clearly appears

from the context of the statute itself. *Hasset v. Welch*, 303 U.S. 303, 58 S.Ct. 559, 82 L.Ed. 858, and cases cited in the opinion in that case.

It is significant that the enactment of August 11, 1939, makes no such provision. Had Congress so intended it would undoubtedly have said so.

The motion to dismiss should be sustained. An order to that effect is this day entered."

It is respectfully submitted that the amount of the Award herein is admittedly in error, and that, therefore, the motion for Summary Judgment and dismissal of the Complaint should be denied.

It is respectfully submitted that the date of injury was found by the referee and supported by substantial evidence to be in February of 1938. That by virtue of the law the provisions of Section 13(a) of the Act became operative in February of 1938. That in order for the respondent, Steffen, to perfect the rights he might have by virtue of the Longshoremen's and Harbor Workers' Act it was incumbent upon him to file his claim with the deputy [53] commissioner within one year from the date of injury February, 1938. That the failure of the respondent, Steffen, to so file his claim with the deputy commissioner deprived the deputy commissioner of jurisdiction of the matter, as the Act which created the right in Steffen also created the limitation.

Wherefore, it is respectfully submitted that the motion for a Summary Judgment should be denied, and that the complainants herein should have a decree in conformity herewith.

Respectfully submitted,

SYRIL S. TIPTON

Attorney for Complainants

(Affidavit of Service by mail.)

[Endorsed]: Filed Mar. 22, 1944. [54]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This is a proceeding on the admiralty side of the court where an injunction is sought to annul a compensation order and an award of compensation to Albert V. Steffen made by the Deputy Commissioner of the United States Employees' Compensation Commission after appropriate proceedings pursuant to Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, as amended. (44 Stat. 1424, 33 U.S.C.A., sec. 901 et seq.)

Another phase of the subject matter involved in the proceeding has been before both the district court in No. 1790-H of the files of this court, and the Circuit Court of Appeals in *Hillcone S.S. Co. vs. Steffen* (C.C.A. 9), 136 F.2d 967.

From any factual point of view the decision of the Deputy Commissioner is unassailable. *South Chicago Co. v. Bassett*, 309 U.S. 257; *Crowell v. Benson*, 285 U.S. 22. A stipulation made in open court at the hearing of this proceeding which conclusively concedes an erroneous mathematical com-

putation in the award obviates the necessity of remanding the matter to the Deputy Commissioner for correction.

There therefore remain but two questions of law for decision: (1) Did the Deputy Commissioner err as a matter of law in failing to [56] find that the claim in controversy was barred by Section 13a of the Act? Title 33 U.S.C.A. sec. 913(a), and (2) Did the Deputy Commissioner err as a matter of law in applying the provisions of Section 30f of the Act to the claim? Title 33, sec. 930(f) U.S.C.A.

We think that both questions should be answered in the negative and that both rulings of the Deputy Commissioner are in accordance with law and that neither ruling should be disturbed by the court in this proceeding.

The Longshoremen's and Harbor Workers' Compensation Act should be liberally construed in favor of the employee. *Baltimore & Philadelphia Steamboat Co. v. Norton, etc.*, 284 U.S. 408, and every provision of the Act must be given effect, to consistently attain the particular purpose of this remedial legislation.

The general scheme and aim of this Act in the language of the Supreme Court in *South Chicago Co. v. Bassett*, *supra*, was to provide compensation to employees engaged in maritime employment for disability resulting from injury occurring upon the navigable waters of the United States, where recovery through Workmen's Compensation proceeding might not validly be provided by State law.

There can be no question as to the applicability of the Act in this proceeding, *Hillcone S.S. Co. v. Steffen*, *supra*.

Undoubtedly, under controlling authority, if the right of the claimant to compensation is to be determined solely by Section 13a of the Act, the award obviously is not in accordance with law. See *Kobilkin v. Pillsbury, et al.* (C.C.A. 9), 103 F.2d 667, affirmed by an equally divided court, 309 U.S. 619. We think, however, that the correlative and cooperative provisions of Section 30f of the Act should be applied, under the record in this proceeding, to secure to the claimant the benefits of the remedial legislation which was designed and intended by Congress for a category of workers in which Steffen has been classified.

Our Circuit Court of Appeals has, we think, in effect, stated in *Marshall, Deputy Commissioner et al. v. Pletz*, 1942 A.M.C., [57] Volume 1, pp. 631, 632, that the time limit prescribed by section 13a does not commence to run until the right to further payment of compensation is controverted.

Claimant's compensable disability has been conclusively found to have commenced August 5, 1938, although the accident which caused the compensable result occurred much earlier, but the basis for a claim under the Act is the existence of disability for work resulting in a loss of wages, and it is indisputably shown that the claimant, notwithstanding the earlier accident and injury, continued in his employment and was paid his usual wages to and

including August 4, 1938. Therefore August 5, 1938 is the date for the commencement of the one-year period for the filing of a claim under section 13a considered to the exclusion of other provisions of the Act. The substantive right of the claimant to statutory compensation under the Act had upon that date reached the point requiring procedural action to enforce the right by the application of all statutory methods. Section 30f of the Act, which was added to the Act by an amendment of June 25, 1938, provides that where the employer has knowledge of an injury of an employee and fails, neglects or refuses to file a report thereof in the manner and as required by subdivision (a) of Section 30 of the Act, the limitations of Section 13a should not begin to run against the claim of the injured employee or in favor of either the employer or carrier until such employer's report shall have been filed with the Commission.

The record here shows and the Deputy Commissioner has found that the employer had actual knowledge of the injury to the claimant on the day of the accident and on various occasions thereafter but that the employer at no time made any report thereof to the Commission or to the Deputy Commissioner.

It is thus clear, we think, that the claim here in issue, which was filed January 25, 1941, is not under the facts and circumstances shown by the record before this court, to be barred from consideration.

.We do not think that Section 30f of the Act can be disregarded in ascertaining whether the substantive right of Steffen to compensation had lapsed, regardless of whether his statutory right accrued on the day of the accident or upon the stoppage of his wages by reason of the disability caused by the accident, but commencing subsequently. *DiGiorgio Fruit Corporation et al. v. Norton, Deputy Commissioner et al.* (C.C.A. 3), 93 F.2d 119; *Potomac Electric Power Co. v. Cardillo, Deputy Commissioner* (App. D.C.), 107 F.2d 962.

The change wrought by Section 30f operates under the record in no manner to affect vested or substantive rights or to impair the obligation of contract. The relationship between the employer, carrier and Steffen that is here involved is purely statutory and a mere change of procedure or substitution of remedies may operate retrospectively without running counter to any established principle of construction. Cf. *Paramino Lumber Co. et al. v. Marshall, Deputy Commissioner et al.*, 309 U.S. 370; *New Amsterdam Casualty Co. v. Cardillo, Deputy Commissioner* (App. D.C.), 108 F.2d 492.

The right to invoke a bar against the claim for compensation because of lapse of time still remained in complainants, but the Congress by the amendment of June 25, 1938 imposed merely an additional procedural requirement upon them after they had notice or knowledge of the compensable incident. There is nothing in the legislation under consideration which limited the right of the Legis-

lature to enlarge procedural or remedial provisions so as to meet changing needs to better effectuate the purpose and aim of the Act. We think that by reason of complainants' failure to comply with all requirements of the Act they have not been prejudiced by the delay in the filing of the claim in controversy in this proceeding.

Findings of fact, conclusions of law and judgment ordered for respondents, vacating order for interlocutory injunction entered February 2, 1944, and upon the issues of complaint and answers [59] pursuant to stipulation as to error of computation of award with costs.

Respondents' attorneys will prepare, serve and present such findings of fact, conclusions of law and judgment within five days from notice of this memorandum of decision under Rule 7 of this court.

Dated April 25, 1944.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Apr. 25, 1944. [60]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause came on regularly to be heard on the 27th day of March, 1944, before the above entitled Court, the Hon. Paul J. McCormick, Judge Presiding, on motions for summary judg-

ment by the respondents, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the Thirteenth District, and Albert V. Steffen, the respondent Albert V. Steffen appearing by its attorneys, A. A. Goldstone and Wm. P. Lord, A. A. Goldstone of counsel, the respondent Warren H. Pillsbury, Deputy Commissioner, appearing by Charles H. Carr, U. S. Attorney, and Clyde C. Downing, Assistant U. S. Attorney, Clyde C. Downing of [61] counsel, and the complainants, Hillcone Steamship Company, Santa Cruz Oil Company and the Associated Indemnity Corporation appearing by their attorney Cyril S. Tipton; the parties hereto, through their respective counsel, having stipulated that an erroneous mathematical computation in the award was made by the Deputy Commissioner and that the correct amount of the award should be \$3390.95 instead of the \$4410.71 awarded, and counsel for the respective parties having stated that the only issues, it having been conceded by complainants that all other issues were properly determined by the Deputy Commissioner, in this proceeding are:

(1) Whether the Deputy Commissioner erred as a matter of law in failing to find that the claim of the respondent Albert V. Steffen for compensation under the Longshoremen's and Harbor Workers' Compensation Act was barred by the provisions of Section 13a of the Act; and (2) Whether the Deputy Commissioner erred as a matter of law in applying the provisions of Section 30f of the Act to the claim,

and the cause having been submitted on the record as certified by said Deputy Commissioner, oral arguments and briefs of counsel, and the Court having been fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I.

That it is not true that there was no substantial evidence to support the finding of fact of the Deputy Commisisoner that the injuries of respondent Albert V. Steffen were sustained during the month of February, 1938, and it is true that such finding is supported by the evidence, and that from any factual point of view the decision of the Deputy Commissioner is unassailable.

II.

That the claim of respondent Albert V. Steffen was not barred by the provisions of Section 13a of the Longshoremen's and [62] Harbor Workers' Compensation Act.

III.

That the said Deputy Commissioner did not erroneously apply Section 30f of the Act to said claim; that the compensable disability of respondent Albert V. Steffen occurred on August 5, 1938, and that August 5, 1938, is the date for the commencement of the one-year period for the filing of a claim under said Section 13a of the Act; that the employer of the respondent Albert V. Steffen had actual knowledge of the injury to respondent Albert V.

Steffen on the day it occurred in February of 1938, and on various occasions thereafter, but that said employer at no time made any report thereof to the Commission or to the Deputy Commissioner; and that said Deputy Commissioner did not erroneously apply Section 30f of the Act to said claim of respondent Albert V. Steffen.

IV.

That respondents have not been prejudiced by the delay in the filing of the claim of respondent Albert V. Steffen.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing findings of fact, the Court concludes that from any factual point of view, the decision of the Deputy Commissioner is unassailable; that the claim of the respondent Albert V. Steffen is not barred by Section 13a of the Longshoremen's and Harbor Workers' Compensation Act; that the Deputy Commissioner did not err in applying Section 30f of the Act to the claim of the respondent Albert V. Steffen; that the order for the interlocutory injunction entered February 2, 1944, be vacated; and that the respondent Albert V. Steffen is entitled to compensation under the Act, in the sum of \$3390.95.

Let judgment be entered accordingly.

Dated this 10 day of May, 1944.

PAUL J. McCORMICK

Judge of the United States
District Court

[Endorsed]: Filed May 10, 1944. [63]

In the District Court of the United States, Southern
District of California, Central Division
No. 3423-M
(In Admiralty)

HILLCONE STEAMSHIP COMPANY, a corpo-
ration; SANTA CRUZ OIL COMPANY, a cor-
poration; and ASSOCIATED INDEMNITY
CORPORATION, a corporation,
Complainants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner of the United States Employees' Com-
pensation Commission for the Thirteenth Dis-
trict; and ALBERT V. STEFFEN,
Respondents.

DECREE

The above entitled action came on regularly to be heard on March 27, 1944, before the above entitled Court, the Hon. Paul J. McCormick, Judge Presiding without a jury on motions for summary judgment by the respondents, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the Thirteenth District, and Albert V. Steffen, the respondent Albert V. Steffen appearing by his attorneys, Wm. P. Lord and A. A. Goldstone, A. A. Goldstone of counsel, the respondent Warren H. Pillsbury, Deputy Commissioner, appearing by Charles H. Carr, U. S. Attorney, and Clyde C. Downing, Assistant U. S. Attorney, Clyde C. [64] Downing of

counsel, and complainants, Hillcone Steamship Company, Santa Cruz Oil Company and Associated Indemnity Corporation, appearing by their attorney Syril S. Tipton; the parties hereto, through their respective counsel, having stipulated that an erroneous mathematical computation in the award was made by the Deputy Commissioner and that the correct amount of the award should be \$3390.95 instead of the \$4410.71 awarded, and the respective counsel having stated that the only issues, it having been conceded by complainants that all other issues were properly determined by the Deputy Commissioner, in this proceeding are:

(1) Whether the Deputy Commissioner erred as a matter of law in failing to find that the claim of the respondent Albert V. Steffen for compensation, under the Longshoremen's and Harbor Workers' Compensation Act, was barred by the provisions of Section 13a of the Act; and (2) Whether the Deputy Commissioner erred as a matter of law in applying the provisions of Section 30f of the Act to this claim, and the cause having been duly submitted on the record, as certified by said Deputy Commissioner, oral argument and briefs of counsel, and the Court having been fully advised in the premises, and having made its Findings of Fact and Conclusions of Law,

It is hereby ordered, adjudged and decreed as follows:

That the respondent Albert V. Steffen is entitled to relief under the Longshoremen's and Harbor

Workers' Compensation Act, and that the award of the Deputy Commissioner under the Act is affirmed in the sum of \$3390.95.

It is further ordered that the order for the interlocutory injunction entered February 2, 1944, be, and the same is hereby vacated and set aside.

It is further ordered that the respondent Albert V. Steffen recover from the complainants his costs herein expended, the same to be taxed by the Clerk of the Court. [65]

Dated this 10th day of May, 1944.

PAUL J. McCORMICK

Judge of the United States
District Court

Judgment entered May 10, 1944. Docketed May 10, 1944. C.O. Book 25, page 331. Edmund L. Smith, Clerk. By L. Wayne Thomas, Deputy.

[Endorsed]: Filed May 10, 1944. [66]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF DECREE

To the Complainants Hillcone Steamship Company,
Santa Cruz Oil Company, and Associated Indemnity Corporation, and their attorney, Cyril S. Tipton:

Please take notice that a decree, copy of which was served on you on May 1, 1944, was duly entered in Civil Order Book No. 25, page 331, in the office of

the Clerk of the United States District Court for the Southern District of California, Central Division, on the 10th day of May, 1944, the last paragraph thereof, with respect to attorneys' fees, having been stricken therefrom.

Dated Los Angeles, California, the 15th day of May, 1944.

WM. P. LORD and
A. A. GOLDSTONE
By A. A. GOLDSTONE
Attorneys for Respondent
Albert V. Steffen [67]

Received copy of the within Notice of Entry of Decree.

Dated: This 15th day of May, 1944.

SYRIL S. TIPTON
Attorney for Complainants

Received copy of the within Notice of Entry of Decree.

Dated: This 15th day of May, 1944.

CHARLES H. CARR
U. S. Atty.
By CLYDE C. DOWNING
Attorney for.....

[Endorsed]: Filed May 15, 1944. [68]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL
AND FOR INJUNCTION PENDING AP-
PEAL

The libelants, Associated Indemnity Corporation, a corporation, and Hillcone Steamship Company, a corporation, and Santa Cruz Oil Company, a corporation, each believing itself aggrieved by the decree of the court made and entered on the 10th day of May, 1944, wherein and whereby its libel and bill of complaint for injunction was denied, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and your petitioners respectfully pray that this appeal may be allowed, that a citation be issued directed to the above named respondents, and each of them, as provided by law, and that a transcript of record and proceedings upon which said decree was based be duly authenticated and sent to the Circuit Court of Appeals for the Ninth Circuit.

ASSOCIATED INDEMNITY
CORPORATION,
HILLCONE STEAMSHIP
COMPANY and
SANTA CRUZ OIL COMPANY
By SYRIL S. TIPTON
Their Proctor [69]

Receipt of copy of the within Petition for Allowance of Appeal and for Injunction Pending Appeal is hereby admitted this 15 day of May, 1944.

RONALD WALKER

Attorney for Respondent

Warren H. Pillsbury

[Endorsed]: Filed May 15, 1944. [70]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now come the libellants in the above entitled cause, by their proctor, and in connection with their petition for appeal, assign the following errors in the decree of this court entered:

I.

That the United States District Court for the Southern District of California, Central Division, erred in making and entering the order and decree, dated the day of denying the libellants' application for mandatory injunction to restrain the order of the respondent, Warren H. Pillsbury, as prayed in its libel, even though subject to the correction stipulated as to the amount due under said award, decision and decree of said Warren H. Pillsbury.

II.

That the said court erred in sustaining the respondent, Warren H. Pillsbury's exception to

libellants' libel and confirming the compensation order, subject to the stipulation as to the amount thereof, to the respondent Albert V. Steffen, made and filed the 2d day of February, 1944, and in denying the motion for an inter- [71] locutory injunction filed by libellants in said action.

III.

That said court erred in refusing to enter a decree and order herein declaring that the said compensation order of respondent, Warren H. Pillsbury, described in the complainants' complaint, was not in accordance with the law, and that the same be vacated and set aside.

IV.

That said court erred in supporting the finding of respondent Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District, under the Longshoremen's and Harbor Workers' Compensation Act, that respondent Steffen filed his claim for compensation benefits before said Deputy Commissioner in the time specified and required by law, although he did not file his claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act within one year of the date of his injury in accordance with Section 13(a) of said Act; that any claim for compensation benefits to which he might be entitled was barred by the running of time; that said Warren H. Pillsbury had no jurisdiction to entertain such claim and the en-

tertainment and awarding of compensation benefits was contrary to law, as was the order, decree and decision of the District Court herein; that there is no justification in law or fact for the finding that time did not begin to run against the claim until disability with loss of wage occurred; that your Honorable Court placed almost entire reliance for the decision complained of on the case of *Marshall, et al. v. Pletz*, 1942 A.M.C., Vol. 1, pages 631-632, a Circuit Court of Appeals decision which is of no authority and effect because it was overruled, annulled and reversed by the United States Supreme Court on January 4, 1943 (see *William A. Marshall, Deputy Commissioner, et al. v. Pletz*, 1943 A.M.C., Vol. 1, page 9); that the said claim was definitely barred by the running of time, which was affirmatively set up and argued and contended at the hearings and proceedings in this matter before said Deputy Commissioner and before your Honor- [72] able Court, and that therefore your Honorable Court exceeded its authority and committed an act without its jurisdiction in vacating the order for interlocutory injunction as aforesaid, because of its issuance and promulgation of findings of fact and conclusions of law and judgment issued and rendered on the 10th day of May, 1944.

V.

That the finding that the claim before Deputy Commissioner Pillsbury was filed within proper time, and that the affirmative allegation and defense

that it was not so properly filed and the act was without the jurisdiction of your Honorable Court and the Deputy Commissioner and was an act contrary to law and not based upon the facts of the case.

SYRIL S. TIPTON

Proctor for Libellants

Receipt of copy of the above Assignment of Errors is acknowledged this 15 day of May, 1944.

RONALD WALKER

Asst. U. S. Atty.

Attorney for Respondent

Warren H. Pillsbury

[Endorsed]: Filed May 15, 1944. [73]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The petition of the libellants in the above entitled cause for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby allowed, the appellants to file a bond in the sum of Two Hundred and Fifty Dollars to be approved by the undersigned Judge and conditioned as a bond for costs of the said Circuit Court of Appeals.

It is further ordered that a copy of this order, certified by the clerk to be such, may be served upon

the solicitors for said Warren H. Pillsbury in lieu of personal service upon him.

Done in Chambers this 15th day of May, 1944.

PAUL J. McCORMICK

Judge [74]

Receipt of copy of the within Order Allowing Appeal is hereby admitted this 15 day of May, 1944.

RONALD WALKER

Asst. U. S. Atty.

Attorney for Respondent

Warren H. Pillsbury

[Endorsed]: Filed May 15, 1944. [75]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents, that Pacific Indemnity Company, a corporation, duly organized and existing under the laws of the State of Calif., and duly authorized and qualified to do business within the State of California, for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws by the United States of America or of the State of California, is held and firmly bound unto Warren H. Pillsbury, as Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, and

unto his successors in such office and unto Albert V. Steffen, in the penal sum of Two Hundred Fifty and 00/100 (\$250.00) Dollars for the payment of which, well and truly to be made unto the said respondents or their said successors and personal representatives respectively, and said Pacific Indemnity Company hereby binds itself, its successors and assigns firmly by these presents.

Signed and sealed at Los Angeles, California, this 12th day of May, A. D., 1944.

The condition of the foregoing obligation and undertaking is such, that whereas the above named libellants, Associated Indemnity Corporation, [76] and Hillcone Steamship Company and Santa Cruz Oil Company, in the above entitled suit have appealed and are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree made and entered in the above entitled Court and cause upon May 10, 1944, granting an order vacating an interlocutory injunction entered on February 2, 1944;

Now, therefore, if the said Hillcone Steamship Company, Santa Cruz Oil Company, and Associated Corporation shall prosecute their said appeal to effect and answer all costs which may be awarded or adjudged against them or either of them if they fail to make good their said appeal, then this obligation shall be void; otherwise to remain in full force and effect, and in case of any breach of said condition, it is expressly agreed that the said District Court may, upon notice to this obligor of not

less than ten days, proceed summarily in the above entitled suit to ascertain the amount which it is bound to pay on account of such breach, and render judgment against this obligor therefor and award execution thereon.

In Witness Whereof, these presents have been executed by the attorney in fact of said obligor thereunto duly authorized and the seal of said obligor affixed, upon the day and year hereinabove written.

The premium charged for this bond is \$10.00 per annum.

PACIFIC INDEMNITY
COMPANY

By W. E. BENING

Its attorney in fact

[Seal]

Attest:

.....
Attesting Agent [77]

State of California,
County of Los Angeles—ss.

On this 12th day of May in the year one thousand nine hundred and 44 before me, Atala M. Carter, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared W. E. Bening, known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said W. E

Bening acknowledged to me that he subscribed the name of Pacific Indemnity Company thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

ATALA M. CARTER

Notary Public in and for Los Angeles County,
State of California

My Commission expires May 28, 1946.

[Seal]

Examined and recommended for approval as provided in Rule 8.

SYRIL S. TIPTON

Proctor for Libellant

I hereby approve the foregoing bond.

Dated this 15th day of May, 1944.

PAUL J. McCORMICK

U. S. District Judge for the
Southern District, Central
Division

[Endorsed]: Filed May 15, 1944. [78]

[Title of District Court and Cause.]

NOTICE OF MOTION RE INTERLOCUTORY
INJUNCTION

To the Respondent, Warren H. Pillsbury, Deputy
Commissioner of the United States Employees'
Compensation Commission, and to United
States Attorney, Attorney for said Respondent:

To Albert V. Steffen, Respondent, and to A. A.
Goldstone and Wm. P. Lord, His Attorneys:

You, and each of you, will please take notice that the Complainants above named, through their attorney, will move the above entitled Court, in the Court Room of Judge Paul J. McCormick, located in the Federal Building, Los Angeles, California, on Monday, May 29, 1944, at the hour of 10:00 A. M., or as soon thereafter as the matter may be heard, for its Order for an interlocutory injunction staying the execution of the Judgment herein pending the appeal of this matter to the United States Circuit Court of Appeals for the Ninth District.

Said motion will be made upon the ground that Complainants herein will be irreparably damaged if an injunction is not allowed [79] during this appeal, and the granting of said injunction will obviate much trouble, vexation and multiplicity of suits.

Said motion will be based upon the Affidavit of M. A. Lavore filed herewith and upon the records, files and proceedings herein.

Dated this 15th day of May, 1944.

SYRIL S. TIPTON

Proctor for Libellants [80]

State of California,
County of Los Angeles—ss.

No. 3423 M

In Admiralty

S. S. Tipton, being duly sworn, says, that affiant is a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within action. That affiant's business address is 823 Title Guarantee Bldg., Los Angeles, Calif. That affiant served a copy of the attached Notice of Motion Re Interlocutory Injunction by placing said copy in an envelope addressed to Charles H. Carr, United States Attorney, his office address, which is 600 Federal Bldg., Los Angeles 12, Calif., which envelope was then sealed and postage fully prepaid thereon, and thereafter was on May 16, 1944, deposited in the United States Mail at Los Angeles. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

S. S. TIPTON

Subscribed and sworn to before me May 16, 1944.

DELLA ALLAIRE

Notary Public in and for the County of Los Angeles,
State of California

My Commission expires October 15, 1946.

[Seal] [81]

State of California,
County of Los Angeles—ss.

No. 3423 M

In Admiralty

S. S. Tipton, being duly sworn, says, that affiant is a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within action. That affiant's business address is 823 Title Guarantee Bldg., Los Angeles, Calif. That affiant served a copy of the attached Notice of Motion Re Interlocutory Injunction by placing said copy in an envelope addressed to A. A. Goldstone and Wm. P. Lord, Attorneys at Law, their office address, which is 608 South Hill St., Los Angeles 14, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on May 16, 1944, deposited in the United States mail at Los Angeles. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

S. S. TIPTON

Subscribed and sworn to before me May 16, 1944.

DELLA ALLAIRE

Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires October 15, 1946.

[Seal]

[Endorsed]: Filed May 18, 1944. [82]

Title of District Court and Cause.]

AFFIDAVIT FOR INJUNCTION

PENDING APPEAL

State of California,

County of Los Angeles—ss.

M. A. Lavore, being first duly sworn, deposes and says:

That he is the Claims Superintendent of Associated Indemnity Corporation, a corporation, one of the libellants in the above entitled cause; that libellants will be irreparably damaged if an injunction is not allowed during this appeal in that if the award of Three Thousand Three Hundred Eighty-nine and 92/100 (\$3389.92) Dollars made in favor of respondent Albert V. Steffens is paid and then the determination on appeal is made in favor of this libellant, much trouble and vexation and multiplicity of suits will be involved in order to obtain the return of said Three Thousand Three Hundred Eighty-nine and 92/100 [83] (3389.92) Dollars, and the advantage of this appeal will be lost to your libellants above named.

Further affiant saith not.

M. A. LAVORE

Subscribed and sworn to before me this 16th day of May, 1944.

DELLA ALLAIRE

Notary Public in and for said County and State.

My Commission expires October 15, 1946.

[Seal] [84]

State of California,
County of Los Angeles—ss.

No. 3423 M

In Admiralty

S. S. Tipton, being duly sworn, says, that affiant is a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within action. That affiant's business address is 823 Title Guarantee Bldg., Los Angeles, Calif. That affiant served a copy of the attached Affidavit for Injunction Pending Appeal by placing said copy in an envelope addressed to Charles H. Carr, United States Attorney, his office address, which is 600 Federal Bldg., Los Angeles 12, Calif., which envelope was then sealed and postage fully prepaid thereon, and thereafter was on May 16, 1944, deposited in the United States Mail at Los Angeles. That there is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed.

S. S. TIPTON

Subscribed and sworn to before me May 16, 1944.

DELLA ALLAIRE

Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires October 15, 1946.

[Seal] [85]

State of California,
County of Los Angeles—ss.

No. 3423 M

In Admiralty

S. S. Tipton, being duly sworn, says, that affiant is a citizen of the United States, over 18 years of age, a resident of Los Angeles County and not a party to the within action. That affiant's business address is 823 Title Guarantee Bldg., Los Angeles, Calif. That affiant served a copy of the attached Affidavit for Injunction Pending Appeal by placing said copy in an envelope addressed to A. A. Goldstone and Wm. P. Lord, Attorneys at Law, their office address, which is 608 South Hill St., Los Angeles 14, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on May 16, 1944, deposited in the United States Mail at Los Angeles. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

S. S. TIPTON

Subscribed and sworn to before me May 16, 1944.

DELLA ALLAIRE

Notary Public in and for the County of Los Angeles,
State of California.

[Seal]

[Endorsed]: Filed May 18, 1944. [86]

[Title of District Court and Cause.]

ORDER FOR INTERLOCUTORY INJUNCTION
PENDING APPEAL AND FIXING THE
AMOUNT OF SUPERSEDEAS BOND

A motion for an interlocutory injunction for an order to stay the execution of judgment herein pending the appeal of this cause to the United States Circuit Court of Appeals for the Ninth District coming on for hearing in the Court Room of the Honorable Paul J. McCormick in the City of Los Angeles on June 5, 1944, before the Honorable Paul J. McCormick. The complainants being represented by their counsel, Cyril S. Tipton, the respondent, Warren H. Pillsbury, by Clyde C. Downing, Assistant United States Attorney, by A. A. Goldstone and Albert V. Steffen by his counsel, A. A. Goldstone.

A motion for an interlocutory injunction and for an Order fixing the amount of the supersedeas bond having been duly made by the complainants and the Affidavit of M. A. Lavore having been duly [87] considered and the matters of record herein having been duly presented by all the parties, and it appearing that the respondent, Albert V. Steffen, is not in need of funds upon which to live, and it appearing that a lump sum payment of \$3390.95 is payable under the decree herein, and it appearing from all of the matters presented that irreparable damage would result to the complainants if a stay were not granted, and good cause appearing therefor;

It is hereby ordered and decreed as follows:

That the amount of the supersedeas bond herein shall be fixed in the sum of \$7000.00.

It is further ordered and decreed that upon the filing of a supersedeas bond in the amount of \$7000.00 that during the pendency of the appeal in the above entitled action to the United States Circuit Court of Appeals for the Ninth District a stay of execution of the judgment provided for herein shall be and is hereby granted.

It is further ordered and decreed that a copy of this Order may be served upon the attorneys for the respective parties in lieu of service upon the parties hereto.

Dated this 12th day of June, 1944.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed June 12, 1944. [88]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents, That we Hillcone Steamship Company, a corporation, Santa Cruz Oil Company, a corporation, and Associated Indemnity Corporation, a corporation, as Principals, and Pacific Indemnity Company, a corporation duly organized and doing business under and by virtue of the laws of the State of California, and duly qualified for the purpose of making, guaranteeing or becoming surety upon bonds or under-

takings required or authorized by the laws of the United States of America, as Surety, are held and firmly bound unto Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, for the Thirteenth District, and Albert V. Steffen, in the sum of Seven Thousand & no/100 Dollars (\$7,000.00), lawful money of the United States, to be paid to them, or their successors, to which payment well and truly to be made, we bind ourselves, and our heirs, executors, administrators and successors, jointly and severally by these presents.

Whereas, on the 15th day of May, 1944 an Order was made by the said Court, in the above entitled cause, allowing the petition of the Complainants to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment and decree entered on the 10th day of May, 1944; and

Whereas, it was further ordered by the Court that upon said petitioners, Hillcone Steamship Company, a corporation, Santa Cruz Oil Company, a corporation, Associated Indemnity Corporation, a corporation, filing a bond in the sum of Seven Thousand & no/100 Dollars (\$7,000.00), with sufficient surety, and conditioned as required by law, the same shall operate as a supersedeas of the said judgment and decree.

Now the condition of the above obligation is such that if the said Complainants shall prosecute said appeal to effect and answer all damages and costs, if Complainants fail to make good their plea, then the

above obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, the Principals have hereunto set their hands and seals and the Surety has caused this instrument to be executed by its duly authorized Attorney-in-Fact and its corporate seal affixed, this 5th day of June, A. D. 1944.

HILLCONE STEAMSHIP
COMPANY

By J. J. COMY
Vice-President

Attest:

T. R. KERDELL
Secretary [89]

SANTA CRUZ OIL
CORPORATION

(Described above as Santa Cruz
Oil Company)

By J. J. COMY
Vice-President

Attest:

T. R. KERDELL
Secretary

ASSOCIATED INDEMNITY
CORPORATION

By [Illegible]
Assistant Secretary

PACIFIC INDEMNITY
COMPANY

By W. E. BENING
Attorney-in-Fact

Examined and recommended for approval as provided in Rule 8.

SYRIL S. TIPTON

Attorney

I hereby approve the foregoing.

Dated this 12th day of June, 1944.

PAUL J. McCORMICK

Judge (or Clerk)

The rate of premium charged on this bond is \$20.00 on the judgment per thousand; the total amount of premium charged is \$70.00.

[Endorsed]: Filed June 12, 1944. [90]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It is hereby stipulated, by and between the parties to the above entitled caused, through their respective attorneys, that for the purpose of making up the record on appeal herein the original certified transcript of the proceedings and testimony had before the respondent, Warren H. Pillsbury, Deputy Commissioner, including the exhibits, shall be transmitted to the Circuit Court of Appeals in lieu of the copies for use in printing the record on appeal.

Dated this 12th day of June, 1944.

SYRIL S. TIPTON

Attorney for Complainants

RONALD WALKER

Asst. United States Attorney

Attorney for Respondent,

Warren H. Pillsbury [91]

A. A. GOLDSTONE &

WM. P. LORD

By A. A. GOLDSTONE

Attorneys for Respondent,

Albert V. Steffen

[Endorsed]: Filed June 12, 1944. [92]

[Title of District Court and Cause.]

ORDER RE RECORD ON APPEAL

The parties hereto having stipulated that the original of certain portions of the record to be printed on appeal may be transmitted to the Circuit Court of Appeals in lieu of copies, and good cause appearing therefor,

It is hereby ordered as follows:

That the original certified transcript of the proceedings and testimony had before the respondent, Warren H. Pillsbury, Deputy Commissioner, including the exhibits, shall be transmitted to the Circuit Court of Appeals in lieu of the copies for use in printing the record on appeal.

Dated this 12th day of June, 1944.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed June 12, 1944. [93]

[Title of District Court and Cause.]

APOSTLES ON APPEAL

To the Clerk of the above entitled Court:

Sir:

You will please make up, certify and file a transcript of the record in the above entitled cause upon the appeal thereof to the United States Circuit Court of Appeals for the Ninth *District*, and incorporate therein the following:

Answer;

Compensation Order and Award of Compensation;

Memorandum of Points and Authorities in Support of Bill of Complaint for Injunction;

Exceptions and Motion for Judgment of Respondents Warren H. Pillsbury and Albert V. Steffen, to Libel;

Testimony taken before Respondent, Warren H. Pillsbury, and any exhibits annexed thereto, particularly, to include those referred to in the libel and bill of complaint;

Opinion and Memorandum of the District Judge, Honorable Paul J. McCormick, dated April 25, 1944; [94]

[Title of District Court and Cause.]

RECEIPT FOR SERVICE

I, A. A. Goldstone, Attorney for Respondent, Albert V. Steffen, hereby admit service upon me of copies of the following instruments:

1. Order Allowing Appeal dated May 15, 1944.
2. Petition for Allowance of Appeal.
3. Citation dated May 15, 1944.
4. Assignment of Errors.
5. Cost Bond on Appeal.
6. Apostles on Appeal dated May 15, 1944.

Dated this 19th day of May, 1944.

A. A. GOLDSTONE &

WM. P. LORD

By A. A. GLADSTONE

Attorneys for Respondent,
Albert V. Steffen

[Endorsed]: Filed May 24, 1944. [96]

[Title of District Court and Cause.]

COUNTERDESIGNATION OF RECORD ON APPEAL AND PRAECIPE

Respondent Albert V. Steffen designates the following additional parts of apostles on appeal in the above entitled matter:

1. Certified record of the proceedings and testimony had before the Respondent Warren H. Pillsbury, Deputy Commissioner on September 27, 1943.

2. Notice of motion for summary judgment together with points and authority attached thereto of the Respondent Albert V. Steffen.

3. Answer of Respondent Albert V. Steffen, answer of [97] Defendant Warren H. Pillsbury, Deputy Commissioner.

4. Motion for summary judgment of Respondent Warren H. Pillsbury, Deputy Commissioner.

5. Memorandum of the Respondent Warren H. Pillsbury in support of his motion for judgment.

It is hereby requested that the record on appeal be prepared in accordance with the foregoing demand and praecipe and certified to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: May 27, 1944.

WM. P. LORD and
A. A. GOLDSTONE

By A. A. GOLDSTONE

Proctors for Respondent
Albert V. Steffen

Received copy of the within counterdesignation this 29 day of May, 1944.

SYRIL S. TIPTON

Received copy of the within counterdesignation this 29th day of May, 1944.

CLYDE C. DOWNING
Asst. U. S. Attorney

[Endorsed]: Filed May 29, 1944. [98]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 98 inclusive contain the original Citation and Admission of Service and full, true and correct copies of: Complaint for Injunction; Answer of Respondent Albert V. Steffen; Notice of Motion for Summary Judgment with Points and Authorities; Answer of Defendant Warren H. Pillsbury, Deputy Commissioner; Notice of Motion for Summary Judgment; Memorandum in Support of Defendant's Motion for Judgment; Memorandum in Opposition to Respondents' Motion for Judgment; Memorandum of Decision; Findings of Fact and Conclusions of Law; Decree; Notice of Entry of Decree; Petition for Allowance of Appeal and for Injunction Pending Appeal; Assignment of Errors; Order Allowing Appeal; Cost Bond on Appeal; Notice of Motion re Interlocutory Injunction; Affidavit for Injunction Pending Appeal; Order for Interlocutory Injunction Pending Appeal and Fixing the Amount of Supersedeas Bond; Supersedeas Bond; Stipulation re Record on Appeal; Order re Record on Appeal; Praecipe for Apostles on Appeal; Receipt for Service; and Counterdesignation of Record on Appeal and Praecipe which, together with the Original Transcript of Proceedings before the United States Employees Compensation Commission, transmitted herewith, constitute the Apostles

on Appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$34.40, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 16 day of June, 1944.

EDMUND L. SMITH,

Clerk,

By THEODORE HOCKE,

Deputy Clerk.

[Seal]

[Endorsed]: No. 10807. United States Circuit Court of Appeals for the Ninth Circuit. Associated Indemnity Corporation, a corporation, Hillcone Steamship Company, a corporation and Santa Cruz Oil Company, a corporation, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, for the Thirteenth District and Albert V. Steffen, Appellees. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 19, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the District Court of the United States, Southern
District of California, Central Division

HILLCONE STEAMSHIP COMPANY,

a corporation, et al.,

Complainants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner of the United States Employees' Com-
pensation Commission, for the Thirteenth Dis-
trict, and Albert V. Steffen,

Respondents.

ASSIGNMENT OF ERRORS

Hillcone Steamship Company, a corporation,
Santa Cruz Oil Company, a corporation, and Asso-
ciated Indemnity Corporation, a corporation, and
each of the Appellants herein, assign errors in the
record and proceedings in this cause by adopting as
their points on appeal the Assignment of Errors
appearing in the transcript of record.

W. N. MULLEN

SYRIL S. TIPTON

Proctors for Complainants

Receipt of copy of above Assignment of Errors
is acknowledged this 29th day of June, 1944.

FRANK J. HENNESSY

Attorney for Respondents

Per T. S.

[Endorsed]: Filed Jun. 29, 1944. Paul P. O'Brien,
Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10807

HILLCONE STEAMSHIP COMPANY,
a corporation, et al.,

Complainants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner of the United States Employees' Com-
pensation Commission, for the Thirteenth Dis-
trict, and Albert V. Steffen,
Respondents.

DESIGNATION OF RECORD ON APPEAL

To the Honorable Paul P. O'Brien, Clerk of the
above entitled Court:

You will please cause to be made up, printed and
filed in the above entitled court and cause the rec-
ord on appeal to consist of the following, to wit:
That part of the transcript upon appeal as certified
to by the Clerk of the District Court, as follows:

The entire record as now certified to your Honor-
able Court, except that part of the record covered
and printed in Apostles on Appeal in that action
entitled, "Hillcone Steamship Company, a corpo-
ration, Santa Cruz Oil Company, a corporation,
and Associated Indemnity Corporation, a corpora-
tion, Appellants, v. Albert V. Steffen", numbered
10361.

The libelants deposit herewith, the sum of Three Hundred Forty and 00/100 (\$340.00) Dollars as estimated cost of printing of said record and will pay such other and further costs or expenses as may be incurred in that behalf.

Dated: June 29, 1944.

W. N. MULLEN

SYRIL S. TIPTON

Proctors for Libelants

Receipt of copy is hereby acknowledged this 29th day of June, 1944.

FRANK J. HENNESSY

Proctor for Respondent

Per T. S.

[Endorsed]: Filed June 29, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION RE RECORD ON APPEAL

It is hereby stipulated, by and between the parties in the above entitled action, through their respective attorneys, that that portion of the record on appeal printed in and covered by the Apostles on Appeal in the previous appeal in this cause, being in the above entitled Court and bearing No. 10361, may be incorporated into and referred to in the present appeal herein, and that that portion of said record on appeal covered by said Apostles on Ap-

peal, as above set out, need not be printed in the Apostles on Appeal herein.

Dated this 28th day of June, 1944.

S. S. TIPTON

W. N. MULLEN

Attorneys for Appellants

CHARLES H. CARR

United States Attorney

By CLYDE C. DOWNING

Asst. United States Attorney

Attorney for Appellee,

Warren H. Pillsbury

A. A. GOLDSTONE &

WM. P. LORD

By A. A. GOLDSTONE

Attorneys for Appellee,

Albert V. Steffen

Receipt of copy of above Stipulation Re Record on Appeal, is hereby acknowledged this 30th day of June, 1944.

FRANK J. HENNESSY

...

Proctor for Appellees

Per T.S.

So ordered:

FRANCIS A. GARRECHT,

United States Circuit Judge

[Endorsed]: Filed June 30, 1944. Paul P. O'Brien, Clerk.

No. 10,807

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HILLCONE STEAMSHIP COMPANY (a corporation), SANTA CRUZ OIL COMPANY (a corporation), and ASSOCIATED INDEMNITY CORPORATION (a corporation),

Appellants,

VS.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Compensation Commission, for the Thirteenth District and ALBERT V. STEFFEN,

Appellees.

APPELLANTS' OPENING BRIEF.

S. S. TIPTON,

W. N. MULLEN,

315 Montgomery Street, San Francisco,

Attorneys for Appellants.

FILED

SEP 11 1944

Subject Index

	Page
Statement of jurisdiction.....	1
Statement of pleadings.....	2
Specifications of the errors relied upon.....	2a
Statement of case.....	2a
Facts	2b
Contentions of respondent Steffen.....	9
Review of opinion of court below.....	9
Appellants' contentions	10
Sections of the Longshoremen's Act especially relied upon..	11
The right to compensation arises out of a contract and the right begins with and depends upon the existence of a cause or right of action.....	13
The date of injury.....	19
Is Section 930(f) retroactive?	23
Decisions on similar questions.....	27
The Kobilkin case.....	29
The Pletz case.....	33
Conclusion	36

Table of Authorities Cited

Cases	Pages
American Mutual Liability Ins. Co. v. Lowe, 85 F. (2d) 625	27
American Mutual Liab. Ins. Co. of Boston v. Lowe, 1936 A. M. C. 1722.....	28
Bethlehem Shipbuilding Corp. v. Cardillo, 102 F. (2d) 299.	27, 28
Callahan v. Chesapeake & O. Ry., 40 F. Supp. 353.....	24
Chase v. United States, 222 Fed. 593.....	19
Colgate-Palmolive-Peet Co. v. U. S., 37 F. Supp. 794.....	26
Dawson v. Columbia Casualty Co., et al., 1940 A. M. C. 1130	25
Dawson v. Johncke Drydock, 33 F. Supp. 668.....	25
Di Giorgio Fruit Corp., et al. v. Norton, 93 F. (2d) 119...	19, 30
Ex parte Fidelity & Deposit Co. of Maryland, 25 F. (2d) 642	25
Fehland v. City of St. Paul, 9 N. W. (2d) 349.....	18
Glantz v. Ind. Acc. Com., 11 Cal. App. (2d) 624.....	20
Guy v. Stoecklein Baking Co., 1 Atl. (2d) 839.....	16
Harris v. Traders & Gen. Ins. Co., 4 So. (2d) 24.....	23
Hassett v. Welch, 303 U. S. 303.....	26
In re Cederbaum, 27 F. Supp. 1014.....	26
Kobilkin v. Pillsbury, et al., 103 F. (2d) 667.....	29, 32, 36
Kropp v. Parker, 8 F. Supp. 290.....	30
Liberty Mut. Ins. Co. v. Parker, 19 F. Supp. 686, Dist. Ct., D. Maryland.....	22
Luckenbach S. S. Co. v. Norton, et al., 106 F. (2d) 137....	27
Marshall v. Pletz, 1942 A. M. C., Vol. 1, 627.....	9, 11, 23, 33, 35
Morrison v. Baltimore & O. Ry. Co., 40 App. D. C. 391, Am. Cas. 1914C, p. 1026.....	24
Ocean Acc. & Guar. Co. Ltd. v. Lawson, 145 F. (2d) 865...	27
Otis v. Parrott, et al., 8 N. W. (2d) 708.....	19

	Pages
Preveslin v. Derby & Ansonia Developing Co., 151 Atl. 518	17
Schwab v. Doyle, 258 U. S. 529.....	26
Slade v. Branham, 48 F. Supp. 769.....	28
Southern Underwriters, et al. v. Lewis, et al., 150 S.W. (2d) 162	17
State Comp. Ins. Fund v. Pillsbury, D. C. Calif. 1939, 27 F. Supp. 852	15
Thomas v. Town of Savannah Beach, 17 S. E. (2d) 747....	17
Turley v. John Hancock Mut. Life Ins. Co., 173 A. 163....	18
United States v. Heinrich, 12 F. (2d) 938, Dist. Ct., D. Montana	18
Winslow v. Carolina Confer. Assn., 211 N. C. 572.....	21
Young v. Hoage, et al., 90 F. (2d) 395.....	26

Codes and Statutes

Judicial Code:

28 U.S.C.A., Sec. 225.....	2
----------------------------	---

Longshoremen's Harbor Workers' Compensation Act:

Section 6 (33 U.S.C.A. 906).....	22
Section 901.....	2
Section 902.....	11, 12
Section 906.....	20
Section 907.....	12
Section 913(a).....	9, 10, 12, 13, 27, 34, 36
Section 914.....	27, 35
Section 921b.....	2
Section 930(f).....	2a, 8, 9, 10, 12, 13, 14, 23, 28, 29, 36

Texts

70 A. L. R. 1436.....	27
6 Dunnell, Dig. & Supp. 10385.....	18

No. 10,807

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HILLCONE STEAMSHIP COMPANY (a corporation), SANTA CRUZ OIL COMPANY (a corporation), and ASSOCIATED INDEMNITY CORPORATION (a corporation),

Appellants,

VS.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Compensation Commission, for the Thirteenth District and ALBERT V. STEFFEN,

Appellees.

APPELLANTS' OPENING BRIEF.

STATEMENT OF JURISDICTION.

The libel, filed in the District Court on the 25th day of January, 1944, was to review a compensation order of a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act. (33 U.S.C.A.

Section 901 et seq. (Ap. 41-44.) The injury occurred during the month of February 1938 in the district (Ap. 42) and the order was made on the 11th day of January, 1944. (Ap. 50.) The District Court therefore had jurisdiction of the libel. (33 U.S.C.A. Section 921(b).) A decree dismissing the libel and affirming the order of compensation was entered on the 10th day of May, 1944. (Ap. 115.) Petition for allowance of appeal to this Court and order allowing the appeal were signed on the 15th day of May, 1944. (Ap. 118 and 122.) This Court therefore has jurisdiction on appeal to review the said decree under Section 128 of the Judicial Code. (28 U.S.C.A. Section 225.)

STATEMENT OF PLEADINGS.

The compensation order of the deputy commissioner conformed to the findings and was against the employer and its insurance carrier. (Ap. 41-44.)

By their libel to review the order the libelants sought to set aside the finding that the statute of limitations had not run against the claim of appellee Steffen, and it was contended said order and award was contrary to law.

Exceptions to the libel were filed by appellees. (Ap. 67-83.) The exceptions were sustained and the libel dismissed and a decree entered confirming the compensation order. (Ap. 113-115.) An opinion was rendered in the District Court. (Ap. 104-109.) Find-

ings of fact and conclusions of law preceded the decree. (Ap. 109-112.)

SPECIFICATIONS OF THE ERRORS RELIED UPON.

Appellants rely upon their assigned errors, Nos. II, III, IV and V. (Ap. 118-120, and 144.)

The effect of the foregoing is that the deputy commissioner, as well as the Court below, erred in finding that Section 930(f) of the Longshoremen's and Harbor Workers' Compensation Act was retroactive. Our contentions, points, statements of law and references to statutes are so co-mingled that the following is made without reference to any assignment in particular, save and except assignment of error designated IV (Ap. 119-120), and as particularly set out herein under the caption "Appellants' Contentions", pages 10-11.

STATEMENT OF CASE.

One sustained an injury under the Longshoremen's and Harbor Workers' Compensation Act and within a few days, at his own expense, obtained medical treatment for a back condition. Thereafter he was disabled for a few days and did not work and was paid his salary. He then continued with his employment for some six months during which time he continued to get medical treatment, which culminated

with his going to a hospital where he remained some two and a half years. He was injured in February, 1938. On June 25, 1938, the Longshoremen's and Harbor Workers' Compensation Act was amended to provide that time did not begin to run as a bar against a claim of injury until reported by the employer to the Deputy Commissioner. No report was filed with the Deputy Commissioner and the employee quit work on August 5, 1938, and was totally disabled up to the time he filed application with the Deputy Commissioner on January 20, 1941. The Deputy Commissioner and the Court below held that the plea of the statute of limitations was not good as against the claim because the amendment of June 25, 1938, was retroactive in effect. It is appellants' contention such provision was not retroactive; that the plea of the statute of limitations was good as against the claim, and that the first suffering of disability did not occur on August 5, 1938, but rather in February, 1938, and in any event, for there to be an injury under such act there is no requirement that there be injury and disability.

FACTS.

Respondent Steffen had worked for some considerable period of time as a watchman on a vessel out of service, and part of the time lived aboard. He alleged some time in February, 1938, he slipped and fell while going from the vessel and injured his back so painfully he sought medical attention and for a few days did not work, but was paid his salary with full knowl-

edge of the facts had by his employer's representative, Mr. Cordes. His condition became so bad he had to quit work on August 5, 1938.

Mr. Cordes denied any knowledge of a report of injury ever having been given him by Mr. Steffen, but said he had complained long before 1938 of a painful back and his condition became so bad that on August 5, 1938, he went to the Marine Hospital in San Francisco, where he was entitled to free care. He was paid his salary for at least two weeks after entering the hospital.

Application for hearing before the Deputy Commissioner was not filed until January 20, 1941, and no compensation or medical treatment was provided by the employer or carrier, except to the extent of salary paid as aforesaid.

The following direct quotations from the testimony are important and from the previous record in Case No. 10,361, the following quotations and page references are made:

"21. Have you received any wages since injury? Yes.

If so, from and to what date? 8-31, 9-15, 9-30-1938. While in hospital."

Case No. 10,361, page 23.

Originally it was contended by Mr. Steffen the statute had not run because of a situation of estoppel or laches.

"Mr. Burns. I claim that this case comes within the Longshoremen's Act, that he was employed by the Hillcone Steamship Company, that

he was injured as he states here, sometime prior to August 8, 1938, and there was notice given to Mr. Cordes, his employer; that his employer took him to the hospital, and later up here; and they have acknowledged that they have told this man repeatedly, after having paid him several payments while in the hospital, they told him that he would be taken care of and get a lump sum, and it is finally gotten to a point where they will not answer his letters or communicate with him. First they came here and told him everything would be all right, everything would be taken care of, and I contend that the man is entitled to his compensation from the date of injury up to the present time, and whatever admittance papers were made out for the man were made out by them, whatever classification they put him under when they put him in the Marine Hospital, Mr. Cordes was present and he handled it."

Case No. 10,361, page 28.

"Q. Now what was done about you as soon as you fell?

A. (Mr. Steffen) Well, I immediately went over to the yard, and Mr. Cordes was waiting for me, and I said, 'I don't think I can make this trip, I just had a terrible spill,' and he said, 'Hell, you will be all right,' so I got in and I drove but it pained me, and we got as far as Lancaster, and that is the reason I bring out the flood conditions, because it started to rain for a couple of days, so I turned the car around and I said, 'We can't get through,' and as I did, it got me, and it locked on me.

Q. What locked on you?

A. My back, and I said, 'It's got me,' and I told him I fell off the ship getting down here, and he said, 'You will be all right,' and then we went down to the Jonathan Club.

Q. Where is that?

A. Figueroa Street, Los Angeles, and we went in there and he immediately went down to see me, and he took a hold of me and worked on my back, and he said, 'You got a bad back,' and I went back up to the room, and we had a few drinks and we stayed around and we didn't go back for three days, and on the second day, we spent that in Mr. Cordes' pent house, and then it was very noticeable that I had to have a doctor, but we thought we would get by anyway, and the next morning we went down to the doctor and he taped me up.

Q. What doctor?

A. Now you got me.

Q. Did Mr. Cordes send you?

A. No, I went by myself.

Q. And you can't remember his name?

A. No, then later on, it was two days later—and every morning, the second morning at the Jonathan Club, they had to come in and help me to get in the steam room, and after the steam they rubbed a liniment on my back to relieve me a little, and then we returned to Long Beach and I went aboard the ship for a few days, and then I went to a chiropractor and I went to an osteopath, and I went to Dr. Carroll, all kinds of doctors."

Case 10,361, pages 38-39-40.

Further covering treatment had in February, 1938, see the following:

“A. The latter part of February.

Q. Was it an M. D. or an osteopath?

A. Yes, an M. D.

Q. How did you happen to go to him?

A. Mr. Cordes and I were in Los Angeles and we were going to drive to San Francisco, and we went to Los Angeles and the back bothered me and we stopped at the Jonathan Club and then I had severe pain and could hardly get around, and we went to the steam room and Eddie, the chief rubber there, told me, he was a friend of Mr. Cordes, ‘You got a bad back there, you better go to a doctor,’ and I said, ‘I will get by all right, I will go to the Public Health when we get back. Mr. Cordes is going to send me over, and three nights I laid around, stayed at his pent house and while we were at the pent house I was so sick my back was throbbing so that I couldn’t straighten it up and I went to some doctor, the lady that owned the pent house told me about, and I went to him and he said, ‘All I can do is that I can tape it,’ that is the first doctor.”

Case 10,361, page 71.

“A. No, I told him I had a bad back and he said, I can’t adjust it,’ but he did adjust the fore part.

Q. You didn’t tell him about the fall?

A. Sure, sure.

Q. Did you see any one after that?

A. I have \$25.00 worth of receipts from Dr. Godfrey, something like that.

Q. Where is he?

A. In Long Beach.

Q. What kind of a doctor is he?

A. An M. D. I have his receipts for you, if you wish.

Q. Now along about when did you go to him?

A. I had about ten treatments from Dr. Settle and he said, 'It is absolutely impossible for me to do anything because I can't give you the correct adjustment,' so I went to this other doctor, Dr. Godfrey, and he gave me a corset with a cork in the back here, and he also treated me electrically, some electric treatments.

Q. That was about when?

A. March I think, I think that was in April, March or April, and then I went over to Pedro later on.

Q. How long were you under treatment by Dr. Godfrey?

A. Darned if I know, I couldn't tell you that, I have got about \$25.00 worth of receipts.

Q. For visits?

A. Yes."

Case No. 10,361, pages 72-73.

"Q. Have you received any wages or compensation or indemnity from that time to the present?

A. Yes, there was two checks, I think I have one here for August, I think I have one, I gave you the last time, it was for July, I think that is August (hands slip to Mr. Jacobson).

Q. For August 16th to 31st, no year on it, you say this is for 1938?

A. Yes, I had two and I think in my last hearing when I testified, I think you will find the other one was for July and one was August."

Case No. 10,361, pages 78-79.

Mr. Steffen said the last time he saw anyone from the employer was when he saw Mr. Cordes shortly after his marriage, which the record shows was in June, 1940.

The Deputy Commissioner found as disclosed by the record in Case No. 10,807, pages 42, 43 and 44, that during the month of February, 1938, claimant sustained personal injury which arose out of and in the course of his employment, it being in the form of a contusion which activated and exacerbated a previously quiescent osteoarthritis of the back causing it to become painful and subsequently disabling. That Mr. Cordes, his superior, then and on many occasions thereafter knew he complained of pain as a result of the fall; and that the employer did not make a report of the injury to the Commission or the Deputy Commissioner as required by Section 930(f), such amendment having been added on June 25, 1938, at least four months after the injury was allegedly sustained.

The Deputy Commissioner further found the claim was filed within time, although the statute was plead, because notice of claim was not given as aforesaid. It was found no medical treatment was furnished by the employer and "that claimant continued in his employment with distress and under medical care until August 5, 1938, when he entered said United States Marine Hospital. His wages were paid to and including August 4, 1938." It was found that compensation was due in the amount of \$4410.71, no part of which had been paid.

CONTENTIONS OF RESPONDENT STEFFEN.

In the Court below Appellee Steffen said the question was, "Did the amendment of Section 30 of the Act by adding thereto Subdivision (f) on June 25, 1938, extend the time within which the Respondent, Albert V. Steffen, could properly file his claim with the Commissioner under the provisions of Section 13(a) of the Act?" Case No. 10,807, page 85. Also see Case No. 10,807, pages 67-84.

REVIEW OF OPINION OF COURT BELOW.

The decision stated there were two questions for decision, and one was whether or not the Commissioner erred as a matter of law in failing to find the claim barred, and in applying the provisions of Section 930(f) of the Act to the claim. It said that the legislation involved was remedial and therefore should be liberally construed and if the case were looked at solely in light of Section 913(a) the award would obviously not be in accordance with law, but that the correlative and cooperative provisions of Section 930(f) of the Act should be applied, thereby saying that such section was retroactive in its effect.

It also said the time limit prescribed by Section 913(a) did not commence to run until the right to further payment of compensation was controverted, and relied on the case of *Marshall v. Pletz*, 1942 A. M. C., Vol. 1, 627 at pp. 631-632. It contended since the disability was found to commence on August 5, 1938, and the basis for a claim under the Act is the exist-

ence of disability for work resulting in a loss of wages, it being shown the man did get his wages prior to August 4, 1938, it was therefore not until then that the one year period began under Section 913(a) to the exclusion of other provisions of the Act, but since 930(f) had not been complied with, the filing of an application on January 25, 1941, could not be said to be barred. It did not believe Section 930(f) could be disregarded in ascertaining whether or not the *substantive right* to compensation had lapsed, regardless of whether his statutory right accrued on the date of the accident. It insisted, after admitting the right to compensation was a substantive one, that Section 930(f) in no manner affected vested or substantive rights nor did it impair the obligation of contract because the relationship involved was purely statutory and a *mere* change of procedure or substitution of remedies *may* operate retrospectively without running counter to any established principle of construction. It said the right to invoke the bar still existed, but Congress imposed after the injury an additional procedural requirement, and because of the failure to follow that requirement there had been no prejudice to appellants. (Case No. 10,807, pp. 104-109.)

APPELLANTS' CONTENTIONS.

As stated in the Assignment of Errors in Case No. 10,807, page 118, we say the Court erred in sustaining the Deputy Commissioner's exception to the libel requested below, and in supporting the Deputy Com-

missioner in finding that Respondent Steffen filed his claim 'within the time required by law, although he did not file his claim for benefits within one year of the date of injury in accordance with Section 913(a). Any claim for compensation benefits to which he might be entitled was barred by the running of time. There was no jurisdiction in the Deputy Commissioner to entertain the application. There is no justification in law or fact for the finding the time did not begin to run against the claim for disability until loss of wage occurred. The reliance placed by the Court below on *Marshall v. Pletz*, supra, is of no authority and effect because it was overruled, annulled and reversed by the United States Supreme Court on January 4, 1943. (1943 A. M. C., Vol 1, p. 9.) The claim was definitely barred by the running of time and the Commission exceeded its authority and committed an act in excess of its jurisdiction in deciding no claim accrued or vested in February, 1938, even though the claimant then obtained medical treatment and was disabled for a period of days when he rendered no service and was paid his salary.

**SECTIONS OF THE LONGSHOREMEN'S ACT
ESPECIALLY RELIED UPON.**

Section 902, Subdivision 2, defines "injury" to mean accidental injury or death arising out of or in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from

such accidental injury, and includes an injury caused by the wilful act of a third person directed against an employee because of his employment.

Section 902, Subdivision 10, defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." As will be shown later on, Section 930(f) refers not to disability but to injury, and Section 913(a) refers to injury and not disability.

In Section 902, Subdivision 12, "compensation" means "the money allowance payable to an employee or to his dependents" as provided by this Act, "and includes funeral benefits provided therein."

The words "medical treatment" or anything of similar reference are not defined but we understand the word "compensation" to include any amount the claimant might be in a position to claim in reimbursement of medical treatment obtained at his own expense after notice of injury to the employer and refusal to provide it. See Section 907.

Section 913(a) provides the right to compensation "shall be barred unless a claim therefor is filed within one year after the injury, * * * except that if payment of compensation has been made without an award on account of such injury * * * a claim may be filed within one year after the date of the last payment."

At the time of the injury Section 930 carried five subdivisions not here pertinent. Thereafter there was

added, on June 25, 1938, subdivision (f) which in effect says where the employer or carrier has been given notice of the injury or has knowledge of any injury and does not file a report of it, Section 913 (a) shall not begin to run against the claim until such report shall have been furnished as required by this subdivision (f) of Section 930. In other words, this requirement is based on the knowledge of an employer of the injury having occurred, which of course was denied by the positive testimony of Mr. Cordes. The Deputy Commissioner relied for support on the uncorroborated, uncertain, and in several instances, impeached testimony of Respondent Steffen.

**THE RIGHT TO COMPENSATION ARISES OUT OF A CONTRACT
AND THE RIGHT BEGINS WITH AND DEPENDS UPON THE
EXISTENCE OF A CAUSE OR RIGHT OF ACTION.**

Mr. Steffen, if he sustained an injury as found, had a cause of action therefor at that time and not when he desired to initiate proceedings.

Without a cause of action there was no right to claim. The cause of action, of course, existed because it has been determined by statute that as a matter of contract the right to compensation benefits is read into each contract of employment. It is then the violation of this right to be free of industrial injury from which the cause of action arises.

A cause of action cannot extend more to one than the right from which it flows and there cannot be a right unless it be in existence, determinable and

vested. If this be not true, there would be no cause for an action.

There cannot be a cause of action because an injury has occurred and then another cause of action because disability has resulted from such injury. There can be only one cause of action because of the violation of one right, namely, in this case, to be compensated for by the payment of money for an industrial injury, or furnished medical treatment with the right of reimbursement therefor if not provided upon notice of the injury.

As pointed out heretofore, the entire right to proceed depends upon and flows from the time of injury and, we say especially so, in this case when there was the prompt obtaining of medical treatment with the knowledge of the employer, as found, but for which the employee paid, and the staying away from work during which time full wages were paid by the employer.

Section 930(f), as we will show herein, is not retroactive in its provisions and therefore can only concern itself with injuries or accidents which occurred and were sustained after the addition of this subdivision.

There was no need to file such a form by the employer at the time of the injury or accident, and especially when there was a full awareness thereof, as found by the Deputy Commissioner.

It cannot be said that there was no right to compensation, which we presume to be money in lieu of

wages, until August, 1938, because no injury occurred until there was disability. We say that if the Longshoremen's and Harbor Workers' Act had so intended, it would have so provided. Furthermore, what if the man had never lost time and merely wanted reimbursement for his medical expense? Then would it be said the time began?

Furthermore, assume that there was such an injury with the establishment of a permanent disability with no loss of time. Would it be said that since there was no suspension of work and no stoppage of pay that there was no right to file for compensation for a permanent disability because there had been no loss of wage?

It has been held many times that the payment of wages, when there was disability, is in lieu of compensation and credit may be taken therefor. See *State Comp. Ins. Fund v. Pillsbury*, D. C. Calif. 1939, 27 F. Supp. 852.

In view of the foregoing there was payment of salary in lieu of compensation for two, three or maybe four days right after the injury in February, 1938. There certainly was disability as pointed out in the transcript of the record and there was then an injury, accident and disability all at the same time. At said time there was created the right for reimbursement for medical treatment obtained by Mr. Steffen.

The foregoing is supported by the following citations and comments.

In *Guy v. Stoecklein Baking Co.*, 1 Atl. (2d) 839, it was said:

“A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right. In the latter instance time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation: 37 C. J. 686. Statutes of the latter kind are in the nature of conditions put by the law upon the right given: *Peters v. Hanger*, 4 Cir., 134 F. 586, 588; *Wheatland v. Boston*, 202 Mass. 258, 88 N. E. 769.

In Pennsylvania, this distinction is recognized in those cases which hold that a pure statute of limitations must be pleaded (*Prettyman v. Irwin*, 273 Pa. 522, 117 A. 195), while it is not necessary to so plead in the case of a condition put by the law upon a substantive right given, even though such condition is sometimes spoken of as a statute of limitations: *Martin v. Pittsburg Rys. Co.*, 227 Pa. 18, 21, 75 A. 837, 26 L. R. A., N. S., 1221, 19 Ann. Cas. 818; *First Pool Gas Coal Co. v. Wheeler Run C. Co.*, 301 Pa. 485, 489, 152 A. 685. The latter cases also throw light upon the distinction between the two kinds of limitations.

The contention which the carrier now seeks to assert is purely statutory and is a part of the substantive right to maintain an action for compensation and does not deal with the mere remedy for an otherwise subsisting right. The very act which gave to the claimant the right to maintain an action of this class expressly provided that

such right should be forever barred unless the parties agreed upon the compensation payable or filed a petition as required: *Ratto v. Penn. Coal Co.*, 102 Pa. Super. 242, 247, 156 A. 749. 'Where a statute fixes the time within which an act must be done, as, for example, an appeal taken, courts have no power to extend it, or to allow the act to be done at a later day, as a matter of indulgence. Something more than mere hardship is necessary to justify an extension of time, or its equivalent—an allowance of the act *nunc pro tunc*.' "

Thomas v. Town of Savannah Beach, 17 S. E. (2d) 747, held the right to compensation is a vested right and is not remedial and the right to set off because of a subrogation recovery could not be had even though the act provided such set off at the time the claim was filed, the reason being that at the time of injury there was no such right to set off.

Also see: *Southern Underwriters, et al. v. Lewis, et al.*, 150 S. W. (2d) 162.

Preveslin v. Derby & Ansonia Developing Co., 151 Atl. 518, holds the right to workmen's compensation determined by statute in force at the time of injury was a "vested right" which could not be affected by an act validating an unconstitutional statute. There it was further held a statute purporting to change the rate of compensation for injury occurring previous to the amendment is the "impairment of obligation" and any law changing intention and legal effect of the original parties, giving to one the greater and to the other less benefit in contract, "impairs obligation".

The reason for this is that retrospective laws impairing obligation of contracts or substantial vested rights violate the United States Constitution, Article I, Section 10, and Constitutional Amendment 14. It was further said the Legislature can not change procedure affecting past transactions in such way as to prevent judicial control of that situation.

In *Turley v. John Hancock Mut. Life Ins. Co.*, 173 A. 163, it was said rights are "vested" when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.

In *Fehland v. City of St. Paul*, 9 N. W. (2d) 349, it was said:

"The (compensation) act creates new substantive rights and is not a mere amendment of the common law. It goes far beyond merely affording new remedial rights for old substantive rights. It works a fundamental change in the obligations of employers to their employees. The right to compensation given by the act is independent of fault. It is not based on tort, but is of a contractual nature. A basic thought underlying the act is that the business or industry affected shall in the first instance pay for accidental injuries as a business expense or a part of the costs of production."

6 Dunnell, Dig. & Supp. 10385.

In *United States v. Heinrich*, 12 F. (2d) 938, Dist. Ct., D. Montana, it was said Congress cannot enact a law which would destroy, impair or injuriously affect rights that have been vested under a former

Congressional enactment, and to enforce an enactment effective after the right vested would require a payment in violation of the Federal Constitution. Also see *Chase v. United States*, 222 Fed. 593.

THE DATE OF INJURY.

An injury is a damage to a right or person. Mr. Steffen had a damage to his back at the time he fell. He then had pain and continued to have pain to the time of filing his application, although the extent of disability varied. The following cases show that it was improper for the Court below to say it believed the injury did not occur until there was disability, forgetting for the moment of course that there was disability at the time of the injury as we have heretofore pointed out.

In *Otis v. Parrott, et al.*, 8 N. W. (2d) 708, a truck driver sustained a broken leg and arm when his truck turned over on January 4, 1939. In March, 1939, he developed tuberculosis, from which he died on July 21, 1939. It was said the "date of injury causing such death" is within statute providing that no compensation proceeding shall be maintained unless such proceeding shall be commenced within two years from the date of the injury causing death, which was January 4, 1939.

Di Giorgio Fruit Corp., et al. v. Norton, 93 F. (2d) 119, cannot be taken as an authority to the effect that the statute does not start to run until there is a loss of time for which one would be entitled to compensa-

tion. This case merely held that where one sustained an injury but did not know until within one year of the time he filed his claim that the condition from which he suffered was due to such injury, then it was not until that time the statute started to run. This is similar in effect to the case of *Glantz v. Ind. Acc. Com.*, 11 Cal. App. (2d) 624, and cases involving industrial diseases.

This is not a case where the man had some sort of an unusual incident occur and then later suffered a condition which was found to be related to such incident. In other words, if one knows he has pain, he knows he has been injured. Any doctrine based on the theory that even though one has pain and knows he has been injured, the statutory period does not start to run until he has lost time, is inconsistent. Furthermore, in this case the Court has lost sight of the fact that this man immediately after his fall in February, 1938, had a painful condition and went with his employer and obtained treatment therefor. During this time he was paid his salary and the salary, therefore, was in lieu of compensation for then he rendered no service. Since compensation, if there is more than eight weeks' disability, is payable from the first day of disability (see Section 906), would it not follow that in this case there would have to be a finding that during those first few days of total disability he was compensated by payment of salary by the employer? This certainly would then make those first few days he was away from work the time when he was disabled and for which he could later claim compensation, if the

payment of wage was not in lieu of compensation, inasmuch as it has been found he was disabled for more than eight weeks.

In view of the foregoing we cannot see how the opinion of the Court below, which rests on no authority, can be accepted to hold there is not an injury until one has to leave work and is entitled to compensation. It discards the very theory of when a cause of action occurs and the common accepted understanding and definition of the word "injury". For there to be an injury there does not need to be disability and the Longshoremen's Act does not so provide, and in any event, Mr. Steffen was entitled to compensation for the days he received treatment and then could have claimed reimbursement for his medical expense.

In *Winslow v. Carolina Confer. Assn.*, 211 N. C. 572, it was said:

"The right to compensation under this act shall be forever barred unless a claim be filed with the Industrial Accident Commission within one year after the accident, and if death results from the accident, unless a claim be filed with the Commissioner within one year thereafter' * * * For this reason, where a claim for compensation under the provisions of the North Carolina Workmen's Act has not been filed with the Industrial Commission within one year after the date of the accident which resulted in the injury for which compensation is claimed, or where the Industrial Commission has not acquired jurisdiction of such claim within one year after the date of such accident (see *Hardison v. Hampton*, 203 N. C. 187, 165 S. E. 355) the right to compensation is barred."

Liberty Mut. Ins. Co. v. Parker, 19 F. Supp. 686, Dist. Ct., D. Maryland, is a longshoreman's case where in December, 1934, one slipped on a ship's deck, catching his weight on his right thumb. He mentioned this to his foreman but no injury was apparent until some time thereafter when a knot appeared, which subsequently proved to be a ganglion. About a month thereafter the employee was told by his physician the ganglion would have to come out. Other medical advice he obtained was that if it did not pain, to do nothing about it. He made no complaint to the employer until February, 1936, when he noticed the fingers of the right hand were being affected. He asked for medical treatment but continued to work until May 5, 1936, when the employer gave him medical treatment. The employer made no report of the accident to the Deputy Commissioner until February, 1936, and the claimant filed no claim until April, 1936, more than a year after the accident. The Court found the claimant was not actually disabled from the time of the accident until May 5, 1936. The Deputy Commissioner held the statute of limitations had not run. The Court reversed the Commission and said the swelling in the back of the hand became apparent on the evening of the accident and within a month he was advised it should be cut out. His work was not directly interfered with by the condition. The Court said this was a case where the injury sustained was practically contemporaneous with the accident and where the injury was clearly patent and not latent. Since he needed medical treatment and medical treatment is classed (Sec. 6 (33 U.S.C.A. 906)) as part of

the compensation to which the employee is entitled, the claim was barred because the employee's claim was not filed within a year after the injury occurred.

IS SECTION 930(f) RETROACTIVE?

If the right to compensation was vested at the time of the injury and Section 930(f) was purely statutory and not retroactive in its effect, then as the Court below said, the limitation of time would have run against the claim. That this right was vested is entirely supported by the cases cited and under this caption it will be noted too the case of *Marshall v. Pletz*, supra, upon which the Court below relied, had been overruled by our Supreme Court prior to the time the decision in the Court below was rendered.

If the decision objected to is good, then all employers and insurance carriers involved will have to re-open their files and take out every case of injury which occurred from the inception of this Act up to June 25, 1938, and report all injuries claimed where liability was properly denied and rights protected without the then necessity of reporting such claims.

The Court below also refers to *Marshall v. Pletz*, supra, for authority that a controversion notice must be filed by the carrier before the time would start to run, but from our reading of the Act and cases pertinent, and even the case of *Marshall v. Pletz*, we cannot see where such has any support.

In *Harris v. Traders & Gen. Ins. Co.*, 4 So. (2d) 24, it was said, where it is provided payment shall be

forever barred unless the parties shall have agreed upon a payment to be made or unless within one year after the accident proceedings were begun, such right was one of preemption and not prescription and therefore, since there had been no agreement for the payment of compensation within the one year limitation, the claim was barred because the employee had not filed a claim.

Callahan v. Chesapeake & O. Ry., 40 F. Supp. 353, states the rule is stated in the syllabus from *Morrison v. Baltimore & O. Ry. Co.*, 40 App. D. C. 391, Ann. Cas. 1914C, p. 1026, as follows:

“Under the Federal Employers Liability Act of June 11, 1906 (Fed. St. Ann. 1909 Supp., p. 585, the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of the right.

This is a case in which a general statute of limitation is relied upon. In such case the statute must be plead. But it is a case in which the statutory remedy provides as a condition precedent that the action thereon must be commenced within a prescribed time. Such fact is jurisdictional and may be raised by motion to dismiss. *Bell v. Wabash Ry. Co.*, 8 Cir., 58 F. (2d) 569.

It is a well recognized rule of statutory construction that a law will not be considered retro-

active unless such legislative intent clearly appears from the context of the statute itself. *Hassett v. Welch*, 303 U. S. 303, 58 S. Ct. 559, 82 L. Ed. 858, and cases cited in the opinion in that case.

It is significant that the enactment of August 11, 1939, makes no such provision. Had Congress so intended it would undoubtedly have said so."

In *Dawson v. Johncke Drydock*, 33 F. Supp. 668, it was said:

"In the case of *Young v. Hoage, Deputy Commissioner, et al.*, 1937, 67 App. D. C. 150, 90 F. (2d) 395, 400, it was definitely held that the provision of the Longshoremen's and Harbor Workers' Compensation Act, requiring a claim for compensation to be filed by survivors within a year after the death, is mandatory; and that compliance therewith is jurisdictional."

That an extension of a limiting statute must be definitely shown to be retroactive is clearly covered in *Dawson v. Columbia Casualty Co., et al.*, 1940 A. M. C. 1130.

Ex parte Fidelity & Deposit Co. of Maryland, 25 F. (2d) 642, well considers the question of whether or not statutory limitations after the creation of a right are retrospective or prospective and the Court said statutes are to be interpreted prospectively unless the language thereof requires contrary construction. It further held that where a right had become fixed, retroactive operation would not be practical, particularly if it destroyed a right.

In *In re Cederbaum*, 27 F. Supp. 1014, it was again said statutes granting a right or preventing the exercise of a right will be interpreted prospectively, unless the language thereof requires a different construction.

In *Colgate-Palmolive-Peet Co. v. U. S.*, 37 F. Supp. 794, it is stated that every statute operates on future acts unless a contrary intent is expressly declared.

Again in *Schwab v. Doyle*, 258 U. S. 529, it is said laws are not to be considered as applying to cases which arose before their passage unless that contention is clearly expressed.

Our contention is supported in *Hassett v. Welch*, 303 U. S. 303, which considered the question of when statutes were to be considered prospective or retrospective and the Court said:

“In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively;”

In *Young v. Hoage, et al.*, 90 F. (2d) 395, it was again clearly stated in 1937 that where a statute such as the Longshoremen's Act gives a right unknown to common law and limits time within which an action shall be brought to assert such right, the limitation of time within which to file the claim defines and controls the right. In other words, in the case at bar the right to file a claim for compensation is governed by the law at the time of the accrual of the right.

The Act as it previously stood was not illegal or unconstitutional and there was no necessity for retro-

active legislation to cure an administrative defect. Therefore, to attempt to make the amendment retroactive would be the taking of due process. There is no cure necessary to the previous provision and the amendment merely placed upon it an enlargement and therefore, in accordance with the annotations found in 70 A. L. R. 1436, it is quite evident the interpretation requested by Mr. Steffen and the Commission is entirely unsupported by present or previous decisions.

DECISIONS ON SIMILAR QUESTIONS.

To support our contention the right here was vested and the contention of the Court below is incorrect the following citations and authorities are made:

In *Luckenbach S. S. Co. v. Norton, et al.*, 106 F. (2d) 137, it was again said the right to reopen within one year of the date of the last payment, regardless of whether a compensation order has been issued, is remedial and therefore can be affected by a change in the specification of procedure, although the date of accident was prior to the adoption of the amendment. The Court said the amendment is not retroactive since the limitation is from the last payment of compensation. It referred to *American Mutual Liability Ins. Co. v. Lowe*, 85 F. (2d) 625, and *Bethlehem Shipbuilding Corp. v. Cardillo*, 102 F. (2d) 299.

If, as held in *Ocean Acc. & Guar. Co. Ltd. v. Lawson*, 145 F. (2d) 865, the limitation of Section 914(h) must be construed in harmony with and in conformity with Section 913(a), we cannot see how it can be

said Section 930(f) takes away the effect of the right of the employer or carrier to say that the claim must be filed within one year. The Court here said the right to file the claim was one of right and was in existence only one year.

American Mutual Liab. Ins. Co. of Boston v. Lowe, 1936 A. M. C. 1722, states:

“The above statute was amended May 26, 1934, Chapter 354, Sec. 5, 48 Stat. 807, 33 Mason’s U. S. C., Sec. 922, by inserting a provision therein limiting the right of the Deputy Commissioner to reopen the case to ‘one year after the date of the last payment of compensation,’ but the statute as amended gives no indication that it was to have a retroactive effect. Therefore it should not be so interpreted. *U. S. v. Heth*, 7 U. S. 399, 413; *Harvey v. Tyler*, 69 U. S. 328, 347; *Sohn v. Waterson*, 84 U. S. 596. It follows that the claims existing at the date of the amendment were not thereby destroyed and the time limitation therein prescribed began to run on the date of its enactment, May 26, 1934. *Sohn v. Waterson*, supra.”

If the defense of the statute of limitations is jurisdictional, then in accordance with *Bethlehem Shipbuilding Corp. v. Cardillo*, 102 F. (2d) 299, if more than a year elapsed from the time of the injury and the filing of the application, the jurisdiction of the Deputy Commissioner is taken and therefore the date is an essential jurisdictional fact.

Slade v. Branham, 48 F. Supp. 769, is another case where it was held claim must be filed within a year and the right to file a claim was a statutory right and if not exercised within the time prescribed, there was

no longer the right. In this case the injury occurred on October 6, 1936, and no contention was made that there had to be a finding that Sec. 930(f) had to be complied with before the statute was said to have run.

THE KOBILKIN CASE.

Kobilkin v. Pillsbury, et al., 103 F. (2d) 667, was decided by your Court and when taken to the United States Supreme Court the decision was sustained by a four and four decision on the petition for writ of certiorari, which placed it in the position of having been denied and therefore makes that decision not only controlling on the District Court below, but your Honorable Court as well. The reasoning applied in that opinion of your Court was avoided by the Court below and by respondents below. We say it is a well worded brief and opinion directed against the contentions of respondents heretofore made and which will be no doubt made to the appeal herein.

In this case one sustained an injury on June 7, 1935, and it was found he had a bad bruise which caused three weeks' disability. Thereafter, with some impairment he continued to work until January 9, 1937, when he had a severe pain in his shoulder and was then advised of a structural defect which was due to his injury of June 7, 1935. Less than two and a half months after being so advised he filed his claim which was denied by the Deputy Commissioner on the ground it had not been filed within one year of the last payment of compensation and was therefore

barred. Your Court considered the propriety of that decision and said the right to compensation for disability shall be barred unless a claim therefor is filed within one year after the *injury*, thereby distinguishing between the words "injury" and "disability". It was pointed out the appellant therein claimed the nature of the original injury had been overlooked, and the necessity for an operation was not known until January, 1937, and since the exact nature of the injury was not known until more than a year after the payment of compensation, the time did not begin to run until the existence of the injury could be reasonably ascertained, and such was the rule where injuries were latent and not patent. Your Court stated the case of *Kropp v. Parker*, 8 F. Supp. 290, on which the Court and respondents below relied, might lean towards the contention made if the situation were one of industrial disease and as was covered in the case of *Di Giorgio Fruit Corp. v. Norton*, 93 F. (2d) 119. Your Court said: "but if the condition there dealt with was purely an accidental injury, and not an occupational disease or infection, we are not able to understand the Court's implied conclusion that it arose 'in the course of employment'." Your Court then went on to say, "decisions arising under statutory provisions analogous to the Federal Act generally hold that the date of injury, and not the subsequent date when incapacity develops is the one from which the time limitation must be reckoned."

It was also said by your Court, "The terms 'injury' and 'disability', separately defined in the statute, are

not synonymous.” It was also said the injury was an accidental one which was inflicted at the time of the accident, and the statute then began to run, and not when the full extent of the injury was first noted. It was said:

“The trauma in fact resulted in an immediate though temporary disability for which the appellant was paid compensation. The circumstance that appellant again became disabled a year and a half later, and the more serious nature of the injury was then for the first time recognized, does not change the situation. The claim was not filed until more than a year after the occurrence of the injury and more than a year after the last payment of compensation. Under the plain terms of Section 13(a) of the statute the claim is barred. * * *

It was the manifest Congressional intent to deny compensation in all cases of disability arising from accidental injury unless claim is filed within the time limited. No provision is made for exceptional cases. We agree that the act is to be liberally construed, but neither the deputy commissioner nor the courts have the power to legislate; and nothing short of legislation would make relief possible in a case like this.”

Your Honorable Court held the terms “injury” and “disability” are not synonymous and if there was knowledge of injury, although not the consequent development was known or anticipated, there was at that time an injury and the statute ran against the injury. It was not held the time did not run until there was disability or a full knowledge of the cause

of the disability. Mr. Steffen knew he hurt his back in February, 1938, as shown by the evidence heretofore quoted, and therefore, the time began to run at the time of the alleged injury in February, 1938, and there was no support for the District Court below or the Deputy Commissioner to find that the date of injury did not occur until there was disability from work.

There is the further complication in that the Court below agreed with the Deputy Commissioner the disability occurred after the amendment and for all intents and purposes the injury did not occur until there was a disabling injury when, as a matter of fact, there was an injury and a known injury which required medical treatment at the time of the accident. It must be remembered that in this case of *Kobilkin*, supra, your Court said:

“The circumstances that appellant again became disabled a year and a half later, and the more serious nature of the injury was then for the first time recognized, does not change the situation. The claim was not filed until more than a year after the occurrence of the injury and more than a year after the last payment of compensation. Under the plain terms of Section 13(a) of the statute the claim is barred. If we turn to Section 22 and assume a change of condition we again encounter the statutory bar.”

THE PLETZ CASE.

The Court below stated it was of the opinion that *Marshall v. Pletz*, 1942 A. M. C. 627 at pages 631-632, in effect stated the time limit prescribed by Section 913(a) does not commence to run until the right to further payment of compensation is controverted, but this case did nothing more than hold there was a situation of laches, and therefore Mr. Pletz filed within a reasonable time.

Mr. Pletz was injured on November 12, 1935, and filed claim for compensation on April 19, 1937, and on May 6, 1937, a notice was filed with the Deputy Commissioner to the effect that the claim would be controverted. The claim was rejected by the Deputy Commissioner on July 29, 1937, and the case went to the District Court which remanded the matter for further proceedings. A new award was made on February 14, 1940, again rejecting the claim. The Court then found no compensation was paid to or accepted by the employee and on May 6, 1937, more than one year after his injury, a formal claim was controverted as aforesaid.

The decision found in 1942 A. M. C. 627, is the one from which the Court below has concluded that your Honorable Court has at least by inference said where there is the failure to follow the prerequisites of Section 930(f), as under the circumstances of this case, the time limit prescribed by Section 913(a) does not commence to run until the right to compensation is controverted. After going over the facts, and considering the statements of the Court below, your Court

said it appeared the carrier, since the man was offered compensation and refused it, under the circumstances assumed it was entitled to defer controverting liability until a formal claim was filed. Your Court said, "We are satisfied that in this both the carrier and the Commissioner mistook the requirements of the act." It is then said Section 913(a) gives the employee a year after cessation of payment of compensation or *injury* to file claim and that where payments are stopped or suspended the employee is put on notice he must make formal claim within a year or forego further compensation. It was contended there, as in the case at bar, where there was a continuing offer of compensation, the employee is entitled to assume the carrier holds itself in readiness to pay the sum offered and that he may dispense with the filing of a claim so long as that situation exists. Your Court then said:

"We think, therefore, that the time limit prescribed by Section 13(a) applies not only to cases where compensation is actually paid but to situations where the statutory compensation is tendered, and the time limit does not commence to run until the continuing offer is withdrawn or the right to further payment is controverted. For the purpose of limitation, tender must be held the equivalent of payment."

The rest of the decision of your Court is to the effect that if, for any cause, an employer considers his obligation to make payment is terminated, he must immediately and unequivocally make his position known. This, of course, is in the face of there having

been a tender. This is all the case holds and we cannot see how by inference in any way it can be said the Court below was justified in interpreting the effect of the decision as it did.

When this *Pletz* case, cited as *Marshall, et al. v. Pletz*, 1943 A. M. C. 9, went to the Supreme Court, that Court said your Honorable Court had held that Section 914 of the Act required an employer or insurer who denies liability to file with the Deputy Commissioner a notice of controversion so as to bring on the question of liability for decision. The Supreme Court said, however, such construction was inadmissible as tender was not payment and under the Act there could be no contention of estoppel and that nonetheless Mr. Pletz was bound to file his claim within the statutory period of one year of his injury or the date of the last payment of compensation.

Where from the foregoing can it be said the Court below was supported in saying it thought your Court in effect had said "that the time limit prescribed by Section 13(a) does not commence to run until the right to further payment of compensation is controverted."

The premise for the decision does not exist and therefore it must be held to be of no effect.

CONCLUSION.

We believe it clear from the foregoing that Section 930(f) is not retroactive in its effect. It would be impractical to say it was, and as well all rules of statutory interpretation prevent the finding it was retroactive and particularly because it does not show any legislative intent that it be retroactive. The Court below has admitted if not retroactive, the claim of Mr. Steffen was barred.

The case of Pletz on which the Court relied had been overruled when the opinion was handed down, making its authority a nullity.

The suffering of a disability is not that which is necessary to start the running of the statute. Compensation does include money claimed for treatment obtained after notice to the employer. As your Court so aptly held in the case of *Kobilkin*, supra, an intelligent reading of the statute shows that the time began to run at the time of injury. To accept the opinion of the Court below would be to say that if anyone was injured before June 25, 1938, and liability had been denied without notice to the Commission, the statute could not be used as a defense although one had been guilty of laches in bringing their action for ten, fifteen or twenty years. .

As provided in Section 913(a), it is for the employee to file a claim within one year of the date of injury or the last payment of compensation for jurisdiction to be created, and certainly this Respondent Steffen failed to do. Something positive was required of him and this he did not do until he filed claim for

compensation benefits in January, 1941. The *Kobilkin* case is full authority for our contention and should have been controlling on the Court below.

We submit the decision of the Court below should be set aside and Respondent Steffen granted nothing.

Dated, San Francisco,
September 8, 1944.

Respectfully submitted,
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Attorneys for Appellants.

No. 10,807.
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HILLCONE STEAMSHIP COMPANY (a corporation), SANTA CRUZ OIL COMPANY (a corporation), and ASSOCIATED INDEMNITY CORPORATION (a corporation),

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Compensation Commission, for the Thirteenth District, and ALBERT V. STEFFEN,

Appellees.

APPELLEES' REPLY BRIEF.

FILED

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TOPICAL INDEX.

	PAGE
Statement of the case.....	1
Facts	3
I.	
The accident to Steffen occurred in February, 1938.....	5
II.	
Steffen's claim is not barred by the statute of limitations.....	6
A.	
Steffen's right to file claim for compensation did not accrue until August, 1938.....	6
B.	
The statute of limitations may be extended to claims accrued but not barred.....	11
C.	
Appellants are estopped to assert the plea of the bar of the statute of limitations.....	18
III.	
Analysis of appellants' opening brief.....	19
Conclusion	24

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Ayers v. Parker, 15 Fed. Supp. 447.....	12, 13
Baltimore & Phila. Steamboat Co. v. Norton, 284 U. S. 408.....	24
Bethlehem Shipbuilding Corporation v. Cardillo, 102 Fed. (2d) 299	17
Binkley Mining Co. v. Wheeler, 133 Fed. (2d) 863.....	12
Candado Stevedoring Corp. v. Lowe, 85 Fed. (2d) 119.....	24
Carscadden v. Territory of Alaska, 105 Fed. (2d) 377.....	17
Chisholm v. Cherokee-Seminole S. S. Corp. et al., 36 Fed. Supp. 967	17
Continental Cas. Co. v. Ind. Acc. Comm., 11 Cal. App. (2d) 619	7, 8
Davis v. Rust et al., 247 N. Y. S. 309.....	15
Davis & McMillian v. Ind. Acc. Comm., 198 Cal. 641.....	13, 16
De Wald v. Baltimore & O. R. Co., 71 Fed. (2d) 810.....	21
Di Giorgio Fruit Corp. et al. v. Norton, 93 Fed. (2d) 119.....	6, 7
Gahling v. Colabee S. S. Co., 37 Fed. Supp. 759.....	17
Glantz v. Ind. Acc. Comm., 11 Cal. App. (2d) 624.....	7
Gormley v. Bunyan, 138 U. S. 623.....	20
Grain Handling Co. v. McManigal, 23 F. Supp. 748.....	21
Guy v. Stoecklin Baking Co., 1 Atl. (2d) 839.....	21
Koblikin v. Pillsbury, 103 Fed. (2d) 667.....	13, 14, 23
Kropp v. Parker, 8 Fed. Supp. 290.....	6, 22
Liberty Mut. Ins. Co. v. Parker, 19 Fed. Supp. 686.....	22
Mammoth Gold Dredging Co. v. Forbes, 39 Cal. App. (2d) 739	5
Marshall v. Pletz, 317 U. S. 383, 87 L. Ed. 348.....	18
Muller case, 208 U. S. 412.....	5
New Amsterdam Casualty Company v. Cardillo, 108 Fed. (2d) 492	16
Oklahoma v. Atkinson Co., 313 U. S. 508.....	5
Orton v. Olds Motor Works, 240 N. Y. S. 570.....	15
Otis v. Parrott et al., 8 N. W. (2d) 708.....	21

	PAGE
Paramino Lbr. Co. et al. v. Marshall, 309 U. S. 370.....	13, 14, 22, 23
Potomac Elec. Power Co. v. Cardillo, 107 Fed. (2d) 962.....	6
Sanders v. Children's Aid Soc., 265 N. Y. S. 698.....	15
South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 84 L. Ed. 732.....	12
Streeter v. Great Lakes Transit Corp., 49 Fed. Supp. 466.....	17
Terminal Shipping Co. v. Branham, 47 Fed. Supp. 561; aff'd 136 Fed. (2d) 655.....	12
Young v. Hoage, 90 Fed (2d) 395.....	13, 14, 23

STATUTES.

Longshoremen's and Harbor Workers' Compensation Act, Sec. 13(a)	7, 11
Longshoremen's and Harbor Workers' Compensation Act, Sec. 30(a)	2, 4
Longshoremen's and Harbor Workers' Compensation Act, Sec. 30(f)	11, 16, 17, 22
Longshoremen's and Harbor Workers' Compensation Act, Sec. 913(a)	20
Longshoremen's and Harbor Workers' Compensation Act, Sec. 913(b)	20
Longshoremen's and Harbor Workers' Compensation Act, Sec. 913(c)	21
Longshoremen's and Harbor Workers' Compensation Act, Sec. 913(d)	21
Longshoremen's and Harbor Workers' Compensation Act, Sec. 930(f)	21
United States Codes, Annotated, Title 33, Sec. 901, note 4.....	21
United States Codes, Annotated, Title 33, Sec. 906.....	20
United States Codes, Annotated, Title 33, Sec. 913(a).....	6, 10
United States Codes, Annotated, Title 33, Sec. 930(f).....	11

TEXTBOOKS.

46 American Law Reports 1101.....	13
31 Corpus Juris Secundum 578, note 3.....	5

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Appellants,

vs.

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Appellees.

APPELLEES' REPLY BRIEF.

STATEMENT OF THE CASE.

Because appellees deem the statement of the case and facts to be materially different in some respects from that presented by appellants, the appellees present the following statements:

In the latter part of February, 1938, the appellee, Albert V. Steffen, fell from a ladder attached to the S. S. Prentiss onto a pontoon. The ship was in the waters of the Pacific at Long Beach. As a result of the fall,

Steffen sustained an injury which was compensable under the Longshoremen's and Harbor Workers' Compensation Act. He was not, however, disabled for work until August 5, 1938, at which time admission to the United States Marine Hospital, San Francisco, was obtained for him by Fred Cordes, his employer's agent and district manager, under whose jurisdiction Steffen worked. Steffen had orally notified Fred Cordes of the accident on the day it occurred, as well as on various occasions thereafter, and shortly after Steffen entered the hospital he was told by Cordes that he would be "taken care of." The employer did not thereafter or at any time make a report of the accident or injury to the Commissioner or Deputy Commissioner as required by Section 30(a) of the Act. On June 25, 1938, the Act was amended to provide that the statute of limitations did not begin to run as a bar against claims for compensation under the Act until the injury was reported by the employer to the Deputy Commissioner. Steffen filed his claim for compensation on Jan. 20, 1941, while he was still in the hospital, and claimed that the plea of the statute of limitations was not good as against his claim because:

(1) Steffen's right to file a claim for compensation did not accrue until August, 1938;

(2) The statute of limitations was extended by the amendment of June 25, 1938, as to claims accrued but not then barred;

(3) Appellants are estopped to assert the plea of the bar of the statute of limitations.

The only issue on this appeal is that of the bar of the statute of limitations, it having been conceded by appellants in the District Court that all other issues were correctly determined by the Deputy Commissioner. The clerical error of the Deputy Commissioner in computing the amount of compensation due Steffen was corrected in the court below.

FACTS.

In the latter part of February, 1938, the time being fixed by the storm and flood in the Los Angeles area (Ap. Case 10361, pp. 32, 39, 52, 53, 61), the appellee, Albert V. Steffen, was injured by a fall from a ladder onto a pontoon while acting within the scope and course of his employment as watchman on the S. S. Prentiss. He was not immediately disabled for work. In fact, right after he suffered the accident, he was requested by Fred H. Cordes, his employer's district manager and agent, to drive Cordes to San Francisco (Ap. Case. 10361, pp. 39, 40, 52, 53, 73) presumably on the business of the employer. Steffen rendered such service when required of him. (Ap. Case 10361, p. 36.) There was therefore no loss of time on the part of Steffen because of the accident prior to August 5, 1938, at which time he entered the United States Marine Hospital (Ap. Case 10361, p. 63), although he and Cordes were held up in Los Angeles by the storm and flood mentioned above.

Steffen continued to perform his duties as watchman until August 5, 1938, and received his regular compensa-

tion to that time. He was not disabled for work until August 5, 1938. (Ap. Case 10807, p. 20; Ap. Case 10361, p. 63.) Steffen reported the accident immediately after its occurrence (Ap. Case 10361, pp. 38, 39, 60) as well as thereafter, and Cordes obtained Steffen's admission to the Marine Hospital (Ap. Case 10361, pp. 40, 61) and promised to "take care" of Steffen, meaning medical and hospital care would be provided for and salary or compensation would be paid to Steffen while he was disabled and a job be given to him when he left the hospital. (Ap. Case 10361, pp. 41, 78, 79; Ap. Case 10807, p. 39.) There was more than just superior and employee relationship between Cordes and Steffen. They were also very friendly, and Steffen placed the utmost trust and confidence in Cordes and relied implicitly on Cordes' assurances of care and compensation until shortly before he filed his claim for compensation in January, 1941. (Ap. Case 10361, pp. 41, 42.)

Although Steffen orally notified Cordes on the day of his accident and on various occasions thereafter of his fall and that he suffered pain as the result thereof (Ap. Case 10807, p. 15; Ap. Case 10361, pp. 38, 40, 60, 77, 78), the employer has never made a report of Steffen's accident or injury to the Commissioner or Deputy Commissioner as required by Section 30(a) of the Longshoremen's and Harbor Workers' Compensation Act. As heretofore stated, Steffen entered the Marine Hospital on August 5, 1938, and remained there until December 22, 1941.

I.

THE ACCIDENT TO STEFFEN OCCURRED IN
FEBRUARY, 1938.

At the risk of placing in this brief unnecessary material, but to clarify the time of the fall sustained by Steffen, we make mention that the time of the accident was fixed by both Steffen and Cordes by reference to the heavy rains and flood in the Los Angeles area, the uncertainty arising from statements that the flood occurred in 1937 or 1938, but more probably 1938.

This court may take judicial knowledge of all matters of general knowledge.

Muller, 208 U. S. 412, at 421.

And it may take judicial notice of facts relating to floods of rivers and streams.

Oklahoma v. Atkinson Co., 313 U. S. 508, at 525;

Mammoth Gold Dredging Co. v. Forbes, 39 C. A. App. (2d) 739;

31 C. J. S. 578, Note 3.

The court may therefore take judicial notice of the fact that the heavy rains mentioned in the testimony commenced in the last week in February, 1938; that the heaviest rains of that period occurred on March 1st and 2nd, 1938, and that the flood of the Los Angeles river mentioned by Steffen in fixing the time of the accident occurred in the first part of March, 1938, the accident having occurred a few days before. The accident therefore occurred in February, 1938.

II.

**STEFFEN'S CLAIM IS NOT BARRED BY THE
STATUTE OF LIMITATIONS.**

Our consideration of the question of the statute of limitations falls into three divisions: (A) Steffen's right to file claim for compensation did not accrue until August, 1938; (B) The statute of limitations may be extended as to claims accrued but not barred; (C) The appellants are estopped to assert the bar of the statute of limitations.

A.

**Steffen's Right to File Claim for Compensation Did
Not Accrue Until August, 1938.**

33 U. S. C. A. 913(a) provides that a claim for compensation shall be filed within one year after the injury. The term "injury" as used in this section means "compensable injury."

Di Giorgio Fruit Corp., et al. v. Norton, 93 Fed. (2d) 119;

Potomac Elec. Power Co. v. Cardillo, 107 Fed. (2d) 962;

Kropp v. Parker, 8 Fed. Supp. 290.

In the case of *Potomac Electric Power Co. v. Cardillo*, 107 Fed. (2d) 962, the employee was struck on the head by the metal end of an air hose on May 24, 1935. He was in the hospital two days and returned to work in a week. At that time he had no claim for compensation, the first seven days of disability not being compensable. Up to November 16, 1936, he was not disabled by reason of the accident. In 1937 he was informed that he was

suffering from a progressive disease of the brain caused by the accident of May, 1935. On August 18, 1937, he filed his claim for compensation. The court held that (1) an intent to bar claims under the Longshoremen's Compensation Act before they arise cannot fairly be imputed to Congress; (2) that the word "injury" as used in section 13(a) of the Act is equivalent to "compensable injury," and the limitation did not begin to run until the claim to compensation arose in 1936 or 1937; and (3) that no reason appears for treating death claims and disability claims differently in this respect or for thinking that the statute does treat them differently.

In *Di Giorgio Fruit Corp. v. Norton*, 93 Fed. (2d) 119, the employee was struck in the eye by a stalk of bananas on July 25, 1932. He returned to work in about a week. On August 11, 1936, he filed a claim for compensation for disability from the loss of the eye. He became aware of the serious condition of his eye in August, 1936. The court held that the word "injury" as used in the Act must be construed in the sense of "compensable injury," and hence claims filed more than one year after disability arose will not be barred.

Appellants cite *Glantz v. Indus. Acc. Comm.*, 11 Cal. App. (2d) 624, properly *Continental Cas. Co. v. Indus. Acc. Com.*, and apparently consider the holding of that case as being favorable to them. (Appellants' Op. Br. p. 20.) It is not. On the contrary, it is a decision wholly favorable to the respondents. In order to under-

stand the case, it is necessary to refer to its companion case, *Continental Cas. Co. v. Indus. Acc. Com.*, 11 Cal. App. (2d) 619, which is as follows:

“George Glantz was employed as a metal worker by H. E. Jaynes & Son whose compensation insurance carrier was the petitioner. About July 21, 1932, Glantz suffered an injury to his left wrist. This injury occurred in the course of, and grew out of, his employment. Glantz thought he had sprained his wrist, had it bound with tape and continued with his work. He was not incapacitated for work for a period of seven days though he might have missed a few days’ work owing to pain in this wrist. On December 15, 1934, he suffered a second injury to the same wrist. While working on the door of an automobile it fell, cutting the flesh on the wrist to the bone. He consulted a physician and X-rays were taken which disclosed an old fracture of one of the bones of the wrist which had not united. It is admitted that this fracture occurred in the accident of July 21, 1932. It was the conclusion of examining physicians that an operation was necessary to unite the two fragments of the bone.

“On February 11, 1935, Glantz filed with the Industrial Accident Commission an application for the adjustment of his claim growing out of his first injury. During the hearing on this application, and on the advice of the commission, he filed an application for adjustment of his claim growing out of the injury of December 15, 1934. Two awards were made.

* * * * *

“Petitioner urges in both cases that the proceedings are barred by the provisions of section

eleven of the Workmen's Compensation Insurance and Safety Act of 1917 (Stats. 1917, p. 831), as the proceedings were not instituted within six months following the fracture of the bone. . . .

"When the limitation, imposed by the Workmen's Compensation Insurance and Safety Act of 1917, commences to run, is a question that is carefully considered and discussed in *Marsh v. Industrial Acc. Comm.*, 217 Cal. 338, page 344 (18 Pac. (2d) 933, 86 A. L. R. 563), where it is said: 'The law does not award compensation for mere pain or physical impairment, unless it is of such character as to raise a presumption of incapacity to earn. The object is to make amends for a disability attributable to the employment, and the test is whether there is an incapacity causing loss of earning power in whole or in part. (*Hustus' Case*, 123 Me. 428 (123 Atl. 514).) In order to be compensable, disability need not be limited to incapacity of a workman to pursue his ordinary occupation, but embraces impairment or earning power generally. (*Gordon v. Evans*, 1 Cal. Ind. Com., pt. 2, 94; *Savich v. Industrial Com.*, 39 Ariz. 266 (5 Pac. (2d) 779.) The term "injury" then is to be understood as connoting compensable injury, and is correlated to an incapacity or disability justifying a compensatory award. (*Dombrowski v. Jennings & Griffin Co.*, 103 Conn. 720 (131 Atl. 745).) Injury and compensable disability are thus more nearly synonymous expressions than are date of injury and date of accident. (*Acme Body Works v. Koepsel*, 204 Wis. 493 (234 N. W. 756, 236 N. W. 378).)'

"When we apply these rules to the instant case we must conclude that the injury to Glantz occurred when it was discovered that he had a broken bone in

his left wrist which would require an operation to cure, which would incapacitate him from working, and would justify a compensatory award. Prior to that time he did not know the nature of his injury, and had not been prevented from working for the required period, and his earning capacity had not been seriously impaired. It is true that he suffered pain and did lighter work than before July 21, 1932, but he did not suffer a compensable injury at that time as defined by the Supreme Court in the Marsh case. It follows that his application for compensation was not barred by the provisions of section eleven of the Workmen's Compensation Insurance and Safety Act of 1917."

In the second case, which is cited by appellants, the court held that "The injury of December 15, 1934, was not serious and resulted in no loss of time or pay. Of itself it is not a compensable injury. There is but one broken bone to repair and Glantz is entitled to but one compensatory award and that for the injury of July 21, 1932. That is fully taken care of in the award of the commission in the proceeding involving that injury. Any further award in the instant case is unnecessary, if not improper." It will be seen that there is nothing in the second case which denied recovery because of the statute of limitations. In fact, it affirmed the award in favor of the employee for the earlier injury.

In all the cases cited above, the injuries were traumatic in origin, and the term "injury" as used in 33 U. S. C. A. 913(a) and the California Workmen's Compensation Act was construed to mean "compensable injury"—*not the date of the accident* but the time from which the em-

ployee had a basis under the statute upon which to claim compensation, *such basis being only the existence of disability for work resulting in a loss of wages.* (Emphasis ours.) Since Steffen was not disabled for work until August, 1938, his compensable injury occurred on August 5, 1938. The statute of limitations in effect then and as modified by 33 U. S. C. A. 930(f) controls, and the claim was timely filed.

B.

The Statute of Limitations May Be Extended to Claims Accrued but Not Barred.

Section 30(f) of the Longshoremen's Compensation Act (33 U. S. C. A. 930(f)), became effective June 25, 1938. It provides that where the employer, or his agent, has knowledge of an injury to an employee and fails, neglects, or refuses to file a report thereof in the manner and as required by the provisions of subdivision (a) of section 30 of the Act, the limitation of section 13(a) shall not begin to run against the claim or in favor of either the employer or the carrier until such *employer's report* shall have been filed. (Emphasis ours.) The evidence shows that the employer knew of the injury, and it is uncontradicted that no such report was ever filed. Steffen's employer and the carrier do not contend that they gave notice to the Deputy Commissioner but maintain that because section 30(f) was added to the Act on June 25, 1938, which was subsequent to the date of the accident, it did not have the effect of extending Steffen's time for filing claim for compensation resulting from the disability which began on August 5, 1938.

It is fundamental that a statute must be construed in the light of the purposes it seeks to achieve and the evils it seeks to remedy, and that remedial legislation is entitled to a broad interpretation so that its public purposes may be fully effectuated.

South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 at 259, 84 L. Ed. 732;

Binkley Mining Co. v. Wheeler, 133 Fed. (2d) 863 at 871.

The Longshoremen's and Harbor Workers' Compensation Act was designed to accomplish the same purpose as state workmen's compensation laws.

Ayers v. Parker, 15 F. Supp. 447.

It was patterned largely upon McKinney's New York Workmen's Compensation Law, and decisions construing particular provisions of the New York act before the passage of this Act are generally followed by federal decisions construing similarly worded provisions of this chapter.

Terminal Shipping Co. v. Branham, 47 F. Supp. 561; Affirmed 136 Fed. (2d) 655.

The accident in the instant case occurred in California. Therefore, we believe, the decisions of the United States Supreme Court, the New York court, and the California Supreme Court relative to situations similar to the one under consideration in this case should be determinative of the issue, but other federal cases will also be cited.

As limitation laws prescribing the time within which particular rights may be enforced relate to remedies only,

it is well settled by the authorities that the legislature has the power to increase the period of time necessary to constitute limitation, and to make it applicable to existing causes of action, provided such change is made before the cause of action is extinguished under the pre-existing statute of limitations.

46 *A. L. R.* 1101 (Citing U. S. Supreme Court decisions);

Davis & McMillan v. Industrial Accident Commission, 198 Cal. 641, at 636-637.

A common expression of the rule is that no one has a vested right in any particular allowance of time unless it has already run in his favor, that is, unless the statute of limitation has completely run and barred the action.

Paramino Lbr. Co. et al. v. Marshall, 309 U. S. 370, which originated in the 9th Circuit in the State of Washington, involved a private act of Congress which directed the Deputy Commisisoner to review a compensation order filed under the Longshoremen's Act even though the right to do so under the Act *had expired five years previously*. (Emphasis ours.) The employer and carrier urged that the time limitation is inseparable from the right, citing *Young v. Hoage*, 90 F. (2d) 395; *Ayers v. Parker*, 15 F. Supp. 445, and *Koblikin v. Pillsbury*, 103 F. (2d) 667, and that

"The lapse of the time limit on such statutory causes of action not only bars the remedy but destroys the liability as well, and an act of the legislature reviving them constitutes a deprivation of property without due process of law."

This is precisely the position taken by the appellants in the instant case, and *Young v. Hoage, supra*, and *Kobilkin v. Pillsbury, supra*, are the cases principally relied upon by appellants. The United States Supreme Court in *Paramino Lbr. Co. v. Marshall* has held to the contrary, and stated in this respect:

“The argument of appellants is that the original award was an adjudication on which further review was barred prior to the enactment of the private act; that thereby rights and obligations were finally determined, the deprivation of which took from appellants a substantive immunity from further claims of Clark and created in Clark new substantive rights.

“* * * But we do not agree that the immunity obtained by the lapse of the time for review is the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim. This private act does not set aside a judgment, create a new right of action or direct the entry of an award. The hearing provided for is subject to the provisions of the general act for Longshoremen’s and harbor workers’ compensation. It does not operate to create new obligations where none existed before. * * *

“It is unimportant whether the claim persisted after the bar or ended with the running of limitation. To cure a fault of administration Congress may validly enact this act.”

If, then, a barred right may be *restored* by a private relief measure (barred after lapse of time), it would seem clear that a time limit may be extended by a general amendment to the law and such extension apply in cases in which the bar of limitations has not as yet operated. This case should be regarded as controlling in principle.

In *Orton v. Olds Motor Works*, 240 N. Y. S. 570, a situation similar to that existing herein with respect to the statute of limitations under the New York Workmen's Compensation Law was presented. It was claimed that there was no right to apply a statute extending time to claims already accrued when the amendment went into effect. At that time the law provided that the right to claim compensation should be barred unless within one year after the accident a claim for compensation was filed with the Commission. The law was amended, effective July 1, 1928, permitting the filing of a claim for compensation after the expiration of one year from the date of the accident, but not exceeding two years, where the Commission shall find that such filing is in the interest of justice. Claimant filed his claim on March 6, 1929, which the Commission accepted. Upon a review of the compensation award the court said that it saw "no reason why the amendment should not apply to *claims accrued but not extinguished*. This claim had not been extinguished at the time the amendment went into effect. The year for filing a claim did not expire until the following February. *The amendment became part of the provisions of the statute dealing with rules of limitation in the prosecution of a claim affecting the remedy only and not the substantive right to compensation*. The period of limitation, though it had begun to run, could be extended by the board." (Emphasis ours.)

Accord:

Davis v. Rust et al., 247 N. Y. S. 309, at 311;

Sanders v. Children's Aid Soc., 265 N. Y. S. 698,
at 700.

Davis & McMillan v. Industrial Accident Commission, 198 Cal. 631, 46 A. L. R. 1095, is an outstanding case on the subject under consideration. It is a case arising under the Workmen's Compensation Act of California. The situation there is parallel to the instant case with respect to the questions raised by the appellants herein on the statute of limitations as to a cause of action accrued but not barred. There, as here, it was claimed that the legislature had no power to extend the statute of limitations as to a claimed vested right to have the statute become operative as of a certain date. We do not want to encumber this brief by quoting extensively from the decision of the California Supreme Court, but we suggest to this court that the California decision answers every contention raised by appellants herein adversely to the contentions of appellants and in complete favor of the appellees.

There have been no decisions under the Longshoremen's Act determining whether or not section 30(f), extending the period for filing claims, applies to claims for injuries which had accrued but which had not expired at the time of the effective date of the amendment. In two cases, however, involving an amendment to section 22 of the Act, the courts have held that the amendment was retroactive.

In the case of *New Amsterdam Casualty Company v. Cardillo*, 108 Fed. (2d) 492, at 493, the court said:

"We think, in this view, that the passage of the amendment neither creates new, nor destroys rights. It applies only to the remedy, and from its date it permits the deputy to enlarge or diminish the former award to meet the circumstances of a particular case.

We think Congress had the power *to extend* or to contract the *period of limitation* as applicable to an indemnity claim *either pending* or subsequently brought.”

To the same effect is *Bethlehem Shipbuilding Corporation v. Cardillo*, 102 Fed. (2d) 299.

Strecker v. Great Lakes Transit Corp., 49 F. Supp. 466; *Chisholm v. Cherokee-Seminole S. S. Corp., et al.*, 36 F. Supp. 967, and *Gahling v. Colabee S. S. Co.*, 37 F. Supp. 759, were cases under the Jones Act relating to seamen, and it was held in those cases that the employer had not acquired any vested rights when the period of limitations was extended and that the statute of limitations may be extended to existing causes not barred.

This Circuit Court of Appeals has held that the principle applicable to extension of time under a statute of limitations is the one which extends the time for the full period of the limitation from the date of the amendment.

Carscadden v. Territory of Alaska, 105 Fed. (2d) 377.

In the instant case it would clearly appear that the claimant, Albert V. Steffen, who was injured in February, 1938, came within the protection of section 30 (f) of the Act, either by reason of the fact that his disability began in August, 1938, which was after the effective date of section 30(f), or by reason of the fact that the amend-

ment applied to claims accrued but not barred on the effective date of the amendment, and it is the position of appellees that the claim was timely filed by reason of both.

C.

Appellants Are Estopped to Assert the Plea of the Bar of the Statute of Limitations.

In the present case, Fred Cordes, the employer's agent and district manager, under whose jurisdiction Steffen worked, promised Steffen that Steffen would be taken care of, that is, that Steffen would be given compensation, medical and hospital care, and a job when he left the hospital. Cordes and Steffen were on very friendly terms and Steffen believed in Cordes implicitly and relied on his promises and was thereby lulled into a sense of security. Cordes did, in fact, obtain Steffen's admission to the Marine Hospital and visited him there. This condition lasted until shortly before Steffen filed his claim for compensation, when he became disillusioned.

Although the majority and minority opinions in *Marshall v. Plets*, 317 U. S. 383, 87 L. Ed. 348, were opposed to each other on the question of whether the facts there warranted the application of the doctrine of estoppel, that the doctrine is applicable in a proper case under the Longshoremen's Act was and is unquestioned, and, we think, is clearly applicable in the instant case. The employer, by promising to "take care" of Steffen, is estopped to assert the bar of the statute of limitations.

III.

ANALYSIS OF APPELLANTS' OPENING
BRIEF.

A.

On page 9 of Appellants' Opening Brief, appellants purport to set forth the contentions of the respondent Steffen. The quoted matter is in fact the contention of appellants and not of Steffen and is contained in the MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR JUDGMENT filed by Mr. Tipton. (Ap. Case 10807, p. 85.) We do not deem this of any particular importance, but call the court's attention to it because apparently appellants give some weight to it as having been the contention of Steffen. Our contentions are broader in scope.

B.

Appellants contend that Steffen was paid disability compensation for several days while in Los Angeles after the attempt of Cordes to drive to San Francisco was made impossible by the storm and flood. (Appellants' Op. Br. p. 15.) The fact is that Steffen was not paid any disability compensation during that time. As previously shown, Cordes requested Steffen to drive him to San Francisco, and Steffen rendered such service when required of him. Presumably this was on the business of the employer, whose place of business is in San Francisco. The storm and flood made it necessary to remain in Los Angeles a few days. There was therefore no loss of time prior to August, 1938, on the part of Steffen and no disability compensation paid to him as claimed by appellants. If anything more need be said, there is no

disability claim allowable under the Act for the first seven days of disability, and Steffen could not have filed such a claim, assuming for discussion only but not at all admitting that appellants' position has some validity. (33 U. S. C. A. 906.)

C.

Appellants assert that section 913(a) of the Act is not a statute of limitation but creates a substantive right in their favor. (Appellants' Op. Br. pp. 16 to 19.)

It is the general rule that the statute of limitations is waived unless pleaded. (*Gormley v. Bunyan*, 138 U. S. 623.) It is unnecessary to multiply authority on this principle. If appellants' position were correctly taken, it would not have been necessary for appellants to raise the defense of the bar of the statute of limitations under the cases cited by them. Section 913(b) of the Act provides otherwise, as follows:

“Notwithstanding the provisions of subdivision (a) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and an opportunity to be heard.”

What is this provision but a declaration in the Act that unless the statute of limitations is asserted as a defense at the first hearing it is waived? This corresponds to raising the bar of the statute of limitations by answer or demurrer as required in ordinary actions, or waiving it by failure to do so.

We also call attention to the provisions of 913(c) and 913(d), as well as 930(f), of the Act, all of which limit the application of section 913(a), and, we believe, establish beyond cavil that 913(a) is a true statute of limitations going only to the remedy and as such comes within the principles set forth in our brief.

The contention of appellants that the Act creates vested rights in them with respect to the statute of limitations and that the Act is not remedial in character is erroneous. In *De Wald v. Baltimore & O. R. Co.*, 71 Fed. (2d) 810, and *Grain Handling Co. v. McManigal*, 23 F. Supp. 748, it is held that the Act is remedial and should be liberally construed and where there is any doubt it should be resolved in favor of the injured employee. (And see 33 U. S. C. A. 901, Note 4.) The error of the appellants is a fundamental one, and their authorities on this subject do not sustain them in the instant case. Nevertheless, we might add that with the exception of *Guy v. Stoecklin Baking Co.*, 1 Atl. (2d) 839, the cases cited by appellants on this point do not deal with statutes of limitation, and that that case, by its terms, is limited by the court to Pennsylvania and is not an authority herein.

D.

The question of the date of injury (Appellants' Op. Br. pp. 19 to 23) is covered by point II A. of this brief.

Otis v. Parrott, et al., 8 N. W. (2d) 708 (Appellants' Op. Br. p. 19) was based on the peculiar wording of the Iowa statute. After recognizing that in other named states "injury" means "compensable injury," the Iowa statute is distinguished. Furthermore, under the Iowa statute the failure of the employer to make a report of an

injury resulting in disability to the commissioner did not create a waiver of the statute of limitations. Under the Longshoremen's Act such failure, as heretofore pointed out, constitutes a waiver. The case is not an authority herein.

Liberty Mut. Ins. Co. v. Parker, 19 F. Supp. 686 (Appellants' Op. Br. p. 22), is distinguished from *Kropp v. Parker*, 8 F. Supp. 290, on the facts. The principle of the *Kropp* case is not repudiated but is affirmed. The distinction is questionable in view of the cases of higher courts cited herein.

E.

The appellants discuss the question of whether section 930(f) is retroactive in their brief, pages 23 to 27. The contention of appellants that if section 930(f) applies to actions accrued but not barred on June 25, 1938, it will be necessary for insurance carriers to reopen their files and take out every case of injury which occurred from the inception of the Act to June 25, 1938, is without merit. Cases against which the bar of the statute of limitations had already run on June 25, 1938, generally speaking, are not affected by the amendment.

The cases cited by appellants under this point are not authorities herein, particularly since the decision in *Paramino Lbr. Co. v. Marshall*, 309 U. S. 370, was handed down on March 11, 1940.

F.

On pages 27 to 29 of their brief, appellants again contend that their right in the statute of limitations was a vested right. Their contention is based on the erroneous assumption that the defense of the statute of limitations is jurisdictional. As heretofore established by the authorities cited in this brief, the statute of limitations in the Longshoremen's Act are remedial only.

G.

With respect to the *Kobilkin* case, 103 Fed. (2d) 667 (Appellants' Op. Br. pp. 29 to 32), we think there is conflict between the decision of this court and the decisions of other Circuit Courts of Appeal which we have cited. However, the *Kobilkin* case does not involve section 930(f) at all. In addition, we call attention to the fact that in *Paramino Lbr. Co. v. Marshall*, 309 U. S. 370, the same contentions were made as are now made by the appellants herein, and the *Kobilkin* case and *Young v. Hoage*, 90 Fed. (2d) 395, were cited and relied upon by the appellants there. The United States Supreme Court decided the issue adversely to appellants' contentions, and we think the principle of *Paramino Lbr. Co. v. Marshall*, *supra*, is controlling here and disposes of the case in favor of respondents and against appellants herein with respect to the plea of the bar of the statute of limitations.

CONCLUSION.

The Longshoremen's and Harbor Workers' Compensation Act must be liberally construed so that the rights of employees will not be defeated by mere technicalities. (*Candado Stevedoring Corp. v. Lowe*, 85 Fed. (2d) 119, at 121.) The Act should also be construed liberally to avoid harsh or incongruous results. (*Baltimore & Phila. Steamboat Co. v. Norton*, 284 U. S. 408, at 414.)

Whether it is held that Steffen's injury occurred on August 5, 1938, which was after the amendment of the Act, or that the amendment applied to claims accrued but not barred on its effective date, the result is the same. In either or both cases the claim of Steffen was filed in time. It is also submitted that the doctrine of estoppel is applicable and prevents the appellants from claiming the bar of the statute of limitations in any event. Therefore, under the facts and the law of the instant case, the decisions of the Deputy Commissioner and the District Court were correct and should be affirmed.

Respectfully submitted,

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No. 10,807

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HILLCONE STEAMSHIP COMPANY (a corporation), SANTA CRUZ OIL COMPANY (a corporation), and ASSOCIATED INDEMNITY CORPORATION (a corporation),

Appellants,

VS.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Compensation Commission, for the Thirteenth District and ALBERT V. STEFFEN,

Appellees.

APPELLANTS' CLOSING BRIEF.

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Subject Index

	Page
Review of Appellees' Statement of the Case.....	1
Comment on Facts	2
Steffen's claim was barred by the statute of limitations.....	3
(a) Steffen's right to file claim for compensation accrued before August, 1938	3
(b) The statute of limitations may not be extended to claims accrued for the creation of liability and re- sponsibility unless intention of the Congress or the legislative body clearly and unequivocally expresses an intention so to do.....	5
(c) Appellants are not estopped to assert the plea of the bar of the statute of limitations.....	10
Comments on appellees' analysis of appellants' opening brief	10
Conclusion	12

Table of Authorities Cited

Cases	Pages
Ayers v. Parker, 15 F. Supp. 447.....	5
Bethlehem Shipbuilding Corp. v. Cardillo, 102 Fed. (2d) 299	9
Binkley Mining Co. v. Wheeler, 133 Fed. (2d) 863.....	5, 8
Carseadden v. Territory of Alaska, 105 Fed. (2d) 377.....	10
Continental Cas. Co. v. Ind. Acc. Com., 11 Cal. App. (2d) 619	5
Davis & McMillian v. Ind. Acc. Com., 198 Cal. 631.....	6
Di Giorgio Fruit Corp. et al. v. Norton, 93 Fed. (2d) 119...	4, 5
Koblikin v. Pillsbury, 103 Fed. (2d) 667.....	4, 5, 11
Kropp v. Parker, 8 Fed. Supp. 290.....	5
Marshall v. Pletz, 1942 A. M. C., Vol. 1, 627.....	4, 5
Marshall v. Pletz, 1943 A. M. C. 9.....	10
New Amsterdam Cas. Co. v. Cardillo, 108 Fed. (2d) 492....	9
Orton v. Olds Motor Works, 240 N. Y. S. 570.....	8
Paramino Lbr. Co. et al. v. Marshall, 309 U. S. 370.....	7, 11, 12
Potomac Elec. Power Co. v. Cardillo, 107 Fed. (2d) 962....	4
South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 84 L. Ed. 732	5, 8
Terminal Shipping Co. v. Branham, 47 F. Supp. 561.....	5

Codes and Statutes

Longshoremen's Act, Section 913.....	12
Longshoremen and Harbor Workers' Act, Section 930(f)...	11, 12
33 U. S. C. A. 906, Subdivision (a).....	3
33 U. S. C. A., Section 922.....	11

Texts

46 A. L. R. 1101.....	6
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Appellees.

APPELLANTS' CLOSING BRIEF.

REVIEW OF APPELLEES' STATEMENT OF THE CASE.

It is stated Mr. Steffen contended the plea of the statute of limitations was not good because his right to file a claim did not accrue until August, 1938, when he left work the second time, that the statute of limitations was extended by the amendment of June 25, 1938, as it was then the claim accrued, and that appellants are estopped to assert the plea of the bar of the statute of limitations.

Appellees contend the only issue, as they see it, is as to the bar of the statute of limitations, although the argument offered refers to the date of injury and several other points, which will be discussed herein.

COMMENT ON FACTS.

The facts have been generally stated in appellants' brief and we find no particular objection to the statement of facts relied upon by appellees, except we cannot agree that no time was lost before August 5, 1938. The man's testimony on pages 4, 5 and 6 of appellants' opening brief clearly shows that during that time he could not do any type of work, such as driving an automobile or acting as a watchman climbing off and on boats immediately after his injury. It definitely shows, particularly on page 6, he could not work in February, 1938, for at least three days and during that time obtained medical treatment, the responsibility for which would have been that of appellants, had he desired to press the claim therefor in the proceedings before the Deputy Commissioner. If he had done this of course there would have existed the situation of one obtaining treatment before there was an injury or before the start of the running of the statute of limitations.

**STEFFEN'S CLAIM WAS BARRED BY THE
STATUTE OF LIMITATIONS.**

Appellees say Mr. Steffen's claim did not accrue until August, 1938, that the statute of limitations may be extended as to claims accrued but not barred, and appellants are estopped to assess the bar of the statute of limitations.

(a) Steffen's right to file claim for compensation accrued before August, 1938.

It goes without saying a compensation order includes determination of liability for medical treatment and that is based upon a claim. Any medical treatment for which Mr. Steffen therefore would wish reimbursement, which was obtained in February, 1938, would naturally have to presume and be predicated upon an injury.

The fact that Mr. Steffen is alleged to have had no right to claim compensation until after August, 1938, because it was not until then that he sustained a compensable injury, creates a definite paradox when 33 U. S. C. A. 906, Subdivision (a), is referred to. The record definitely shows that in February, 1938, Mr. Steffen suffered three days' disability for which he would have been entitled to compensation after he had been disabled more than forty-nine days after again leaving work on or about August 5, 1938. In other words, he later did become entitled to compensation for those three days but it was not paid him because on those days he received his salary. His salary then was compensation. If not received, the compensation to which he would have been entitled would have defi-

nitely created a situation of disability where compensation was payable.

Di Giorgio Fruit Corp. et al. v. Norton, 93 Fed. (2d) 119, applies to industrial diseases and not direct traumatic injuries where there was the acknowledgment of the existence of an injury and of continuous symptoms until a further period of total disability. This too was clearly distinguished by your Honorable Court in *Koblikin v. Pillsbury*, 103 Fed. (2d) 667, and in the case of *Marshall v. Pletz*, 1942 A. M. C., Vol. 1, 627, both of which have been covered in detail in appellants' brief.

Potomac Elec. Power Co. v. Cardillo, 107 Fed. (2d) 962, is of no aid to appellees, for therein it was said:

"We need not decide whether the limitation began to run in 1936 . . . , or in 1937, when he learned that his disability was caused by the accident of 1935. On either view, his claim was timely."

It should be noted the employee in this case was injured on May 24, 1935, and was off two days, for which he was not paid compensation, and then did not lose time again until November 16, 1936. He first was told that his condition from which he suffered after 1936 was due to the injury of 1935 in the Spring of 1937, and he filed a claim on August 18, 1937, which was within one year of November 16, 1936, or when he was first then entitled to compensation for the first two days he was away from work in 1935. In the case at bar, however, Mr. Steffen left work the second time on August 5, 1938, and did not file his application or claim until January 20, 1941, more than two

years after he would have been entitled to compensation for the first three days of disability in February, 1938.

These cases, along with that of *Kropp v. Parker*, 8 Fed. Supp. 290, have been clearly covered by your Court in the *Koblikin* case, wherein it was said the *Di Giorgio Fruit Corp.* case and the *Kropp* case dealt with industrial diseases and not injuries.

Much is made of the so-called *Glantz* case, otherwise known as *Continental Cas. Co. v. Ind. Acc. Com.*, 11 Cal. App. (2d) 619, to which appellants referred in their opening brief. That case, when it is read, will show it was applied to a set of circumstances and conditions as if applicable to the development of a situation of industrial disease or where the first knowledge that a previous incident had caused the condition suffered was obtained at a much later date. All this was discussed and distinguished and disposed of and made clearly not applicable at bar by the *Koblikin* and *Pletz* cases, *supra*.

(b) The statute of limitations may not be extended to claims accrued for the creation of liability and responsibility unless intention of the Congress or the legislative body clearly and unequivocally expresses an intention so to do.

We have no argument as to the extent of the decisions in *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 84 L. Ed. 732, and *Binkley Mining Co. v. Wheeler*, 133 Fed. (2d) 863, but we cannot see where they are of any aid and assistance for the problem here presented. The same comment goes to *Ayers v. Parker*, 15 F. Supp. 447, and *Terminal Shipping Co. v. Branham*, 47 F. Supp. 561.

We do not believe, as appellees contend, that a Legislature has the power to increase the period of time necessary to constitute a limitation and make it applicable to existing causes of action, providing it is made before the cause is extinguished. We submit that where such is attempted there must at least be a legislative showing and statement of intent to make such provision retroactive.

46 A. L. R. 1101 is of no aid because of the statement just made.

It is said that *Davis & McMillian v. Ind. Acc. Com.*, 198 Cal. 631, cited as 641, should be governing because Mr. Steffen was injured in California. This case, however, merely stated that the Legislature had the power to extend the time before an action was outlawed. This case goes to the extent to say that the limitation of time may be extended for the employee, but does not discuss the situation from the point of view of restricting the time insofar as the employer or employer's insurance carrier is concerned. It should be noted also that the extension of the statutory period as covered by the *Davis & McMillian* case went only to the right to compensation. In this case it was said it was evident that the California statute was intended to extend the period of limitation to cases accrued, but in the case at bar no such assumption may be made and especially so in view of the cases which have been cited by appellants and not denied by appellees. All the *Davis & McMillian* case held was as stated therein:

“The Legislature has full control over the mode, times, and manner of prosecuting suit; and when-

ever, upon consideration of an entire statute relating to these matters, it appears to have been the legislative intent to make it retroactive, it will be given this effect."

We ask where in the case at bar, and where in the legislative enactment particularly pertinent, is there shown to be any intent for the lawmakers to make it retroactive.

Paramino Lbr. Co. et al. v. Marshall, 309 U. S. 370, would seem to be the primary authority relied upon by appellees. This case, however, was one where the limitations of time had run against a claim and the Congress, by direct legislation, waived the limitations placed against the trial of the action and instructed the Deputy Commissioner to hear and redetermine the matter. This case admitted there was such a thing as the statute of limitations which barred the claim.

In this case the appellee in 1931 fractured a rib and during his disability was paid compensation, there being a determination he was wholly disabled to July 4, 1931. No proceedings for review were requested, and about five years later legislative order was made for the review of the appellee's case as aforesaid. The Court said by legislative enactment when there was the intent expressed, a statutory bar could be waived providing the legislation showed the intent to be retroactive. This had to be done by a special act.

The Court said that the action taken was merely to cure the fault of administration. This clearly sustains appellants in saying that to make enactments retro-

active there must be a legislative intention and direction to make it so because mere silence is not sufficient.

We have no argument with the contention that such an enactment could be made retroactive, but until there is an intention expressed that it was so intended, it is not retroactive and we fail to find from any of the citations offered by appellees any support for the contention that without definite direction such an enactment is retroactive.

Reference to *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 84 L. Ed. 732, goes not to a situation as here but concerns definition of the term "crew", and in no way goes to the question of whether a statute of limitations provision must be strictly construed. This case says nothing about such a statute being retroactive in its effect or otherwise.

Binkley Mining Co. v. Wheeler, 133 Fed. (2d) 863, refers to a coal code for the purpose of regulating those engaged in coal mines, and we can find nothing in it which applies to the case at bar, and particularly the enactment discussed therein in no way shows there was any contention it was retroactive.

Orton v. Olds Motor Works, 240 N. Y. S. 570, supports us because therein there was approval to a provision that a statute of limitations could be extended from one to two years providing there was the approval of such extension by the board involved in the administration of the Act. In other words, there was the definite expression that where the statute was extended from one to two years, it was intended to have

retroactive effect if and when the board involved so ordered and approved, but not otherwise. There must have been some reason for putting this provision in and we say the answer is in the cases which we have cited to the effect that no retroactive effect in such instances is to be assumed but must be definitely provided for.

New Amsterdam Cas. Co. v. Cardillo, 108 Fed. (2d) 492, is of no help either. There one suffered a hernia in 1931 and was ordered treatment and compensation from August 2, 1932 to August 9, 1937. The help that comes from this case is to appellants' contention. It concerns the amendment to the Longshoremen's Act providing for the reopening of cases under certain circumstances, and holds that such a provision would not be retroactive in effect unless by the very provision itself, such was shown to be the case. The Court said:

"The language of the amendment definitely indicates the intention of Congress to make it both retroactive and prospective, . . ."

For the foregoing reason, therefore, *Bethlehem Shipbuilding Corp. v. Cardillo*, 102 Fed. (2d) 299, is no authority to show that the section with which we are concerned was retroactive in its effect. In the *Bethlehem* case, it was said the wording of the section showed it to be intended to be retroactive and does nothing more than refer to the same principles for support as does *New Amsterdam Cas. Co. v. Cardillo*, 108 Fed. (2d) 492.

Carscadden v. Territory of Alaska, 105 Fed. (2d) 377, is where there was a reduction of a limitation from ten to seven years. The Court said the interpretation with respect to the right of time of amendment depends on the apparent intent of the Legislature. We ask again where in the case at bar there is any apparent intent to make the provision discussed retro-active?

Does it not also seem that in many of the cases upon which appellees rely we find proof and support for your appellants' contentions?

(c) Appellants are not estopped to assert the plea of the bar of the statute of limitations.

That there is no equitable estoppel in longshoremen and harbor workers' cases was clearly held in the case of *Marshall v. Pletz*, 1943 A. M. C. 9, which is a decision of our Supreme Court, and we ask that your Honorable Court read it.

**COMMENTS ON APPELLEES' ANALYSIS OF
APPELLANTS' OPENING BRIEF.**

The documentary evidence heretofore referred to shows that Mr. Steffen lost time in February, 1938, and that compensation is payable from the date after the injury if more than forty-nine days' disability are suffered, and that certainly was the case here.

We take no argument with the statement that the statute of limitations must be plead as a defense, and is waived if not plead at the first hearing, but we

submit on the other hand, as was pointed out in appellants' brief, for the right to compensation to come into existence, if payment was not made, the employee had to file a claim. If the payment of the three days' wages in February, 1938, was the payment of compensation, then the application for benefits and hearing filed in 1941 cannot be considered as a petition to reopen because it was filed more than one year after the last payment of compensation in February, 1938. See 33 *U. S. C. A.*, Section 922.

Appellees say we have cited only one case to show that a statute of limitations is not retroactive when extended, unless it expressly so states, when they have cited no cases to show we are incorrect in our contention and have made no comment or answer to the points covered in appellants' brief under the captions "The Right to Compensation Arises Out of a Contract and the Right Begins With and Depends Upon the Existence of a Cause or Right of Action"; "The Date of Injury"; "Is Section 930(f) Retroactive?", and "Decisions On Similar Questions".

Appellees say that the statute of limitations is only remedial in character, but does not go to the jurisdiction, and cases cited by appellees support such conclusion. This statement we cannot agree with, and fail to find any support of such contention in the cases cited.

To get away from the case of *Koblikin v. Pillsbury, et al.*, 103 F. (2d) 667, which has been analyzed and discussed in detail in appellants' brief, appellees say that it does not involve Section 930(f) at all, and then turn around and say that *Paramino Lbr. Co. et al. v.*

Marshall, 309 U. S. 370, is governing, when we know that it too does not in any way concern Section 930(f) or whether a statute of limitations is retroactive in its effect when not so specified. The *Paramino Lbr. Co.* case certainly showed that the legislative intent was to make its order and decision retroactive only in that one case.

CONCLUSION.

The Deputy Commissioner or his Commission had no jurisdiction over the claim of Mr. Steffen and Section 930(f) of the Longshoremen and Harbor Workers' Act was not retroactive in its effect.

If there was any compensable disability, there was compensable disability for at least three days in February, 1938.

Section 913 of the Longshoremen's Act does not say that there must be disability for which one is entitled to compensation for it to be said an injury occurs or for the starting of the time against the filing of a claim, for therein it is stated:

“The right to compensation for disability under this act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment.”

The right to compensation therefore does not depend on when there is disability for which compensation would be payable, but when there was an injury with the knowledge that there was an injury and a continuation of the knowledge there had been an injury, whether it be accompanied by subsequent disability or not. This point has been evaded definitely by appellees, and we say goes to the crux of the situation because, as appellants have pointed out in their opening brief and herein, it is the date of injury from which the time begins to run. Mr. Steffen knew he was injured in February, 1938, and continued to suffer and doctor up to the time he filed his claim in January, 1941. Any right to compensation Mr. Steffen had flowed from the event of February, 1938, and not the fact that he quit work again in August, 1938.

The order of the Deputy Commissioner should be set aside and appellee Steffen ordered to take nothing.

Dated, San Francisco,
October 23, 1944.

Respectfully submitted,
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